Department of
CRIMINAL JUSTICE TRAINING

KENTUCKY JUSTICE AND PUBLIC SAFETY CABINET

2010

Leadership is a behavior, not a position

CASE LAW UPDATES
SECOND QUARTER

KENTUCKY COURT OF APPEALS
KENTUCKY SUPREME COURT
SIXTH CIRCUIT COURT OF APPEALS

John W. Bizzack, Ph.D.
Commissioner

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Questions concerning changes in statutes, current case laws and general legal issues concerning law enforcement agencies and/or their officers acting in official capacity will be addressed by the Legal Training Section.

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NOTE:

General Information concerning the Department of Criminal Justice Training may be found at http://docjt.ky.gov. Agency publications may be found at http://docjt.ky.gov/publications.asp.

In addition, the Department of Criminal Justice Training has a new service on its web site to assist agencies that have questions concerning various legal matters. Questions concerning changes in statutes, current case laws, and general legal issues concerning law enforcement agencies and/or their officers can now be addressed to docjt.legal@ky.gov. The Legal Training Section staff will monitor this site, and questions received will be forwarded to a staff attorney for reply. Questions concerning the Kentucky Law Enforcement Council policies and those concerning KLEFPF will be forwarded to the DOCJT General Counsel for consideration. It is the goal that questions received be answered within two to three business days (Monday-Friday). Please include in the query your name, agency, and a day phone number or email address in case the assigned attorney needs clarification on the issues to be addressed.

KENTUCKY

PENAL CODE – KRS 508 WANTON ENDANGERMENT

Cochran v. Com.
Ky. 2010

FACTS: On December 29, 2005, Cochran gave birth to a child that tested positive for cocaine. Cochran also tested positive. Cochran was indicted in Casey County for wanton endangerment. She moved for dismissal, which was granted, but the Court of Appeals reversed the dismissal. Cochran appealed.

ISSUE: Does a mother's use of drugs prior to a baby's birth constitute wanton endangerment?

HOLDING: No

DISCUSSION: The Court reviewed a similar case in which a mother was convicted of criminal abuse[1] and concluded that an "identical analysis would apply to a construction of the wanton endangerment statutes to cover a pregnant woman's conduct." The Court agreed that the Preamble to the Maternal Health Act of 1992 indicated that the General Assembly "did not intend criminal sanctions for prenatal use of drugs and alcohol."[2]

The Court reinstated the dismissal of the indictment.

PENAL CODE - KRS 508 - CRIMINAL ABUSE

O'Conner v. Com.
2010 WL 1628050 (Ky. App. 2010)

FACTS: On August 24, 2007 Deputy Wesley (Pulaski County SD) responded to a 911 call from Wright, a social worker. Wright had been at the O'Conner home on a routine visit and knocked, but no one had answered. She stated that she had seen one of the children through a bedroom window. When the deputy arrived, O'Conner "opened the door and explained that he and his wife had been asleep."

Wesley and Wright were permitted inside. They discovered that two boys (an infant and 3 year old) were "in a bedroom with its door jammed from the outside with a screwdriver." There was human waste and no means of "ventilation or sanitation" in the room. The oldest daughter was at school. Neither of the children were physically injured.

Under questioning, O'Conner stated that he decided to lock the door because he'd taken medication and needed to rest. He felt that the children would be endangered if allowed to roam the house.

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[1] Com. v. Welch, 864 S.W.2d 280 (1983).
[2] 1992 Ky. Acts, Ch. 442 (H.B. 192).

O'Conner was indicted and stood trial for Criminal Abuse, the jury was instructed on all three degrees. He was convicted on Criminal Abuse 1st and appealed the denial of a motion for a directed verdict on that count.

ISSUE: Is leaving a child locked in room for a long period of time, without food, water or a bathroom, Criminal Abuse?

HOLDING: Yes

DISCUSSION: The Court reviewed the elements of Criminal Abuse 1st, and noted that "this case poses a novel situation where a parent has been prosecuted under our criminal abuse statutes on the theory that the children were confined in unsanitary and filthy rooms," but arguably sustained no physical injury. However, the statute does not require such injury. The Commonwealth was not required to show that the "children were in imminent danger, nor did it produce medical evidence reflecting the physical condition of the children." The case appeared to be under the "cruel confinement" section of the statute, as the children were "hungry, dirty, and had been without access to a toilet for a substantial period of time." Further, the "conditions inside were beyond deplorable."

The Court focused on the mental state required for the charged offense. It noted that "it appears that the conditions in the home were the result of extreme poverty and a lack of parenting skills." The Court found no "actual intent to cause the harm or potential harm." Instead, this case arose from a "misguided decision" to "keep them from harm while he napped." However, the Court agreed that it might have been more appropriate to prosecute under the Criminal Abuse 2nd or 3rd provisions of the statute, instead, and in fact, both were instructed.

The Court reversed the conviction and remanded the case back for retrial under the lesser-included Criminal Abuse statutes.

PENAL CODE - KRS 508 - ASSAULT

Bussell v. Com.
2010 WL 1729166 (Ky. App. 2010)

FACTS: On December 16, 2008, Officer Brigmon (Middlesboro PD) stopped Bussell's vehicle. As Bussell got out of the car, he "stumbled and then immediately ran toward US-25E." Brigmon went in pursuit, shouting at Bussell. Bussell "ran down an embankment and crossed US-25E, which is a heavily-traveled, four-lane highway." The two ran across the highway and into a parking lot, where Brigmon finally caught Bussell. They struggled and Bussell struck Brigmon in the chest, "temporarily knocking out Officer Brigmon's breath." Bussell got away and Brigmon again pursued. As other officers arrived, Sgt. Spurlock encountered Bussell and ordered him to stop, and still, he ignored the order. Spurlock drew his gun. Officer Busic finally released his dog, and Bussell was apprehended. He smelled "strongly of alcohol" and "continued to act in a belligerent manner, screaming and cursing at the police."

Ultimately he was charged and convicted of 3rd degree Assault. He appealed.

ISSUE: Does a physical injury require a visible sign?

HOLDING: No

DISCUSSION: Among other issues, Bussell argued that Brigmon did not suffer a physical injury during the altercation. Brigmon did not have to be treated nor did he miss any days at work. The Court, however, stated that:

> Simply because Officer Brigmon had no visible signs of injury (such as a bruise or scratch), his physical condition was certainly impaired when the breath was knocked from his body. The evidence also supported a finding that Bussell intended to injure Officer Brigmon. Bussell interprets the evidence as showing that he was merely trying to escape, but the evidence fully supports a finding that Bussell wanted to disable Officer Brigmon physically in order to make an escape.

Further, the Court stated that his argument "overlooks the fact that Bussell assaulted a police officer who was legitimately attempting to detain him, and it also ignores the purpose of KRS 508.025, in which 'the legislature was seeking to protect those individuals who serve this Commonwealth in law enforcement capacities.'"[3]

Bussell's conviction was affirmed.

PENAL CODE - KRS 510 - KIDNAPPING EXEMPTION

Payne v. Com.
2010 WL 1641117 (Ky. 2010)

FACTS: When Conner approached her landlord, Payne, to tell him she and her husband would be moving from their rented home, Payne "grabbed her and kissed her twice on the mouth." He then pulled Conner inside the building, backed her up against a bar and locked the door. Payne groped her until she was able to escape back to the rented trailer where she locked the door. Payne followed Conner and tried to get in. Conner called a family member, who told her to call for law enforcement. The family member then drove to the trailer, where she saw Payne leaving. Deputy Eubanks (Hancock County SO) arrived. He later testified that Conner was "very distraught and frightened."

Payne was charged with Sexual Abuse, False Imprisonment and Kidnapping. He was convicted of Sexual Abuse and Kidnapping. Payne appealed.

ISSUE: Does the kidnapping exception apply when the restraint is incidental to the sexual assault?

HOLDING: No

DISCUSSION: Payne argued that he was entitled to the kidnapping exemption provided by KRS 509.050, because the restraint of the victim "did not go beyond that which occurred incidental to the sexual abuse."

[3] Wyatt v. Com., 738 S.W.2d 832 (Ky. App. 1987).

> This Court employs a three-prong test to determine when the kidnapping exemption statute applies.[4] First, the underlying criminal purpose must be the commission of a crime defined outside of KRS 509. Second, the interference with the victim's liberty must have occurred immediately with or incidental to the commission of the underlying intended crime. Third, the interference with the victim's liberty must not exceed that which is ordinarily incident to the commission of the underlying crime. Essentially, "the appellant must jump through three hoops and the failure to jump through any one of the three hoops is a failure to establish his entitlement to the benefit of the exemption statute." Application of the kidnapping exemption statute is determined on a case-by case basis.[5]

Since the underlying sexual charge was sexual abuse, which was "outside of the statute," Payne satisfied the first prong. With respect to the second charge, the first act of sexual abuse occurred as soon as the victim approached Payne and he then dragged her inside and "locked the door, presumably so the second act of sexual abuse could be "perpetrated in a more clandestine manner." She was not "restrained to achieve any separate objective." It was "immediately with or incidental to" the initial sexual abuse. Payne satisfied the second prong. Finally, "interference with the victim's liberty must not go beyond that which would normally be incidental to the commission of the underlying crime."

Reading the second and third prongs together:

> … it seems evident that the intent of the latter two prongs is to ensure that the means of restraint effectuated in committing the underlying crime are of such a nature that they are a part of, or incident to, the act of committing the crime itself and, as such, temporally coincide with the commission of the crime. If the deprivation of liberty segues into a more pronounced, prolonged, or excessive detainment, then such restraint should no longer be within the confines of the exemption statute and the accused should be held separately accountable for those actions.

The "restraint was both brief in distance and close in time from the commission of the underlying offense."[6]

The Court agreed that Payne qualified for the exemption and reversed the conviction for kidnapping.

PENAL CODE - KRS 510 - RAPE

Elam v. Com.
2010 WL 2428025 (Ky. App. 2010)

FACTS: On May 9, 2007, J.H. was picked up while walking along a road in McCreary County. Elam did not know her but offered her a ride. J.H. later claimed that Elam raped her and that she escaped from the vehicle and sought help from KSP and EMS. A composite sketch was completed and circulated. A witness identified Elam, who was arrested. He initially denied having been involved, but then confessed - stating that the sex was consensual.

[4] Griffin v. Com., 576 S.W .2d 514 (Ky. 1978).
[5] Gilbert v. Com., 637 S.W.2d 632 (Ky. 1982). .
[6] Timmons v. Com., 555 S.W.2d 234 (Ky. 1977). .

Elam was tried and convicted. He then appealed.

ISSUE: Is even minor restraint physical force for First-Degree Rape?

HOLDING: Yes

DISCUSSION: Elam argued that the prosecution failed to prove the element of forcible compulsion. The Court agreed that J.H.'s testimony, that Elam climbed over her, "grabbed her legs and pulled her pants" was sufficient to prove physical force. Elam's conviction was affirmed.

PENAL CODE - KRS 511 - BURGLARY

Grider v. Com.
2010 WL 2471868 (Ky. 2010)

FACTS: On July 27, 2008, Grider and Kaelin knocked on Dougherty's apartment door, in Louisville. She opened the door to two individuals wearing hooded sweatshirts, on backwards, with eye holes cut out of the hoods. The two were armed and pushed her aside, yelling for money and her purse. Since she'd known Grider since childhood, she recognized him as one of the pair. Her neighbor heard her screams and saw that Dougherty's door was ajar and responded; he was also confronted by the robbers, who fled.

Dougherty called 911 and told the operator that she believed one of the men was Grider and that he had taken her money and wallet. The two were arrested and Kaelin eventually testified against Grider.

Grider was convicted of Burglary and PFO and appealed.

ISSUE: Must a gun be proven to be operable for a Burglary charge?

HOLDING: No

DISCUSSION: Grider argued that because the prosecution failed to prove the gun he had was operable, that the deadly weapon element of first-degree burglary was unproved. (The gun was apparently never found.) The Court concluded however, that the pistol used "regardless of its operability, falls into the class of weapons which may discharge a shot that is readily capable of producing death or serious physical injury."

Grider's conviction was affirmed.

PENAL CODE - KRS 515 - ROBBERY

Wilburn v. Com.
312 S.W.3d 321 (Ky. 2010)

FACTS: Wilburn (along with his brother and another individual) was accused of robbing a liquor store in Louisville, on April 18, 2007. During the robbery, the assailants attempted to fire their weapon, but where unsuccessful. The clerk, however, was more prepared and fired at the robbers, who immediately

fled. Police fanned out and searched for the robbers. Wilburn's accomplice, Terrance, was apprehended; he quickly confessed and identified Wilburn as the gunman. No gun was located on the subjects but an unloaded revolver was found nearby. Ammunition matching the weapon was found in the getaway car, which suggested the "Wilburn brothers may have simply forgotten to load the gun before the robbery attempt."

Both were charged with Burglary, Robbery and PFO. Wilburn was convicted and appealed.

ISSUE: Is entering an open establishment to commit a crime a burglary?

HOLDING: No (but see discussion)

DISCUSSION: Wilburn argued that the burglary charge was inappropriate "because he did not enter or remain unlawfully on the premises of the liquor store. "' "He argued] that the liquor store [was] a public place that he was licensed to enter, and that he immediately fled following Bussman's gunshots, and so did not unlawfully remain once his license was revoked."

The Court agreed that:

> Wilburn agrees that Bussman's firing of the gun at him was the functional equivalent of a personally communicated lawful order by an authorized person not to remain in the store, and that at that point Wilburn's license to remain in the store was revoked. KRS 511.090(2) . However, at that juncture, Wilburn did not remain upon the premises; rather, he fled immediately. Based upon this fact, we must conclude that once his license to remain was revoked, Wilburn did not "remain unlawfully" upon the premises of the liquor store with the intent of committing a crime. It follows that his conviction must likewise fail under this provision of the first-degree burglary statute.

The Court reversed the Burglary conviction.

Wilburn also argued that first-degree robbery was invalid, because the weapon was unloaded. The Court launched an extended discussion on the issue, and concluded that

> KRS 500.080(4)(b)'s definition of "deadly weapon" as a reference generally to the class of weapons which may discharge a shot that is readily capable of producing death or serious physical injury. A .38 caliber revolver, operable or not, falls into that class of weapons. A toy gun or a water pistol does not.

Therefore, Wilburn was armed with a deadly weapon within the meaning of 515.020(1)(b), and he was not entitled to a directed verdict upon the grounds that the Commonwealth failed to prove his firearm met the statutory definition of a deadly weapon .

The Court affirmed his conviction for Robbery.

Hobson v. Com.
306 S.W.3d 478 (Ky. 2010)

ISSUE: On July 11, 2005, Hobson broke into a vehicle and stole, among other things, an OL and credit cards. He tried to use them at several locations, including an Ashland Wal-Mart. The cashier recognized it was stolen and was able to covertly alert her manager. Officer Schoch (Ashland PD) was in the store on an unrelated matter and responded to the register to question Hobson. Hobson said he was the individual on the OL, but Schoch challenged that because "he looked nothing like the person pictured on the license." Hobson then said that the OL belonged to his cousin and he had permission to use the card. He agreed to go with Schoch to the office to get that confirmed, leaving the items at the register. On the way to the office, he fled out the door, which Schoch in pursuit. They struggled and Schoch's ankle was badly broken.

Hobson was charged with, among other things, First-Degree Robbery. He was convicted and appealed.

ISSUE: Must the force be committed in order to commit the actual theft to make an offense a robbery?

HOLDING: Yes

DISCUSSION: Hobson argued that "at the time he used force against Schoch there had been an interruption of the theft, he had abandoned the theft, and thus the use of force did not occur during 'the course of committing a theft.'" The Court reviewed the statute and agreed.

The Court continued:

> Since the adoption of KRS 515.020, three published cases have considered situations in which the use of force by the defendant did not occur prior to or contemporaneous with the attempted theft, but, as here, occurred during an attempt to escape from the scene:[7] To lay the groundwork for our discussion, we begin with a review of these cases . In Williams, the defendant broke into a dry cleaning business and was in the process of stealing items when he was interrupted by a store employee. The defendant fled out the back door and discarded the stolen items in a dumpster. When the pursuing employee caught up to him, the defendant brandished a knife, and the employee retreated to the store, retrieving the stolen items along the way. Thus, Williams is squarely on point with the present case - the theft was unsuccessful, the use of force occurred during the escape phase after the stolen items had been abandoned, and after any expectation of accomplishing the contemplated theft had been given up . Williams concluded that conviction was proper under KRS 515.020, stating as follows:
>
> In 1975, K.R.S . 515.020 became effective; and in essence the statute says that if force or the threat of force is used, then a robbery has been committed. It is the Commonwealth's argument that the statutory clause, "in the course of committing theft," encompassed Williams' flight from the scene, and that the theft was not complete because Williams was

[7] Williams v. Com., 639 S.W.2d 786 (Ky. App. 1982); Mack v. Com., 136 S.W..3d 434 (Ky. 2004); Bumphis v. Com., 235 S.W.3d 562 (Ky. App. 2007).

> still in the escape stage. The Commonwealth cites the Kentucky Penal Code, Final Draft (L.R.C .1971), Commentary to Section 1600(iii) at 180: Sections 1605 and 1606 (K.R. S. 515.020 and K.R.S. 515.030) change this law by expanding robbery to include all situations involving the use of force "in the course of committing theft ." As indicated above, this is intended to extend all the way from the attempt stage of theft through the escape stage

The Court agreed with the cases reviewed "to the extent they recognize that an act of theft extends through the thief's getaway attempt, or escape." However, if they have already "abandoned [the] intention to accomplish a theft," the Court found that the elements of robbery were not present. In this case, the "merchandise he intended to steal had long been left at the checkout counter."

Hobson's conviction was reversed.

Smith v. Com.
2010 WL 2471513 (Ky. 2010)

FACTS: On September 8, 2008, Smith and two accomplices (Hooten and Easton) robbed a check cashing business in Louisville. Hooten and Easton later testified pursuing to a plea agreement against Smith, who they claimed proposed the robbery. They took cash and cell phones from employees and customers. Unfortunately for the trio, however, a local firefighter spotted them going inside with their faces covered and made the call to the police, following them until the police could catch up. The witness, Givens, saw a gun being thrown from the car before police arrived and the gun was recovered.

Upon testing, the firearms examiner stated the gun could not function properly as the slide was jammed. She could not speculate as to when the damage occurred, or how.

Smith was indicted and ultimately convicted of Robbery; he appealed.

ISSUE: Must a firearm be functional for a First-Degree Robbery charge?

HOLDING: No

DISCUSSION: Smith argued he was entitled to have had the jury instructed on Robbery 2nd, because the jury could have "had reasonable doubt as to the functionality of the gun at the time of the robbery." The court reviewed the use of the term "deadly weapon" with respect to a robbery charge, and concluded that it fit the definition in KRS 500.080(4)(b), even if there was a question of its "actual operability at the time of the crime."

The court upheld the conviction.

PENAL CODE – KRS 520 – PROMOTING CONTRABAND

Taylor v. Com.
313 S.W.3d 563 (Ky. 2010)

FACTS: Taylor was arrested and transported to the Montgomery County jail. The arresting officer asked him twice if he had marijuana (or presumably other contraband) on his person and warned him that taking it into the jail was a felony. Taylor denied it and the officer did not find any when he searched Taylor. He was taken inside and the jailer searched him again, finding marijuana.

Taylor was indicted and tried for promoting contraband. He moved for suppression, which was denied. He was convicted and appealed. The Kentucky Court of Appeals affirmed his conviction. Taylor further appealed.

ISSUE: Is the taking of contraband (drugs) into a detention facility during an arrest considered voluntary?

HOLDING: Yes

DISCUSSION: Taylor argued that "a person does not knowingly and voluntarily take contraband into a detention facility when he is taken involuntarily into the facility." The Court, however, found that he "voluntarily took possession of and hid the contraband, and he could have disposed of it before entering the facility."

The Court agreed it put Taylor in a Catch-22 situation, but this did not make his actions involuntary. Had he disclosed the marijuana as a result of the arresting officer's questioning, he would have incriminated himself, but he "made a conscious choice … a gamble, and he lost." "Asserting his right to not incriminate himself does not prevent the further investigation, nor the use of the fruits of that investigation."

Taylor's conviction was affirmed.

PENAL CODE - KRS 524 - INTIMIDATING A WITNESS

Hess v. Com.
2010 WL 2326473 (Ky. App. 2010)

FACTS: Prior to the night in question, Scott and Tonia Hess had been married and divorced. On July 19, 2007, the couple was attempting to reconcile and Scott stayed with Tonia on occasion. That night, Scott became upset and went to take a shower. Tonia heard banging around and glass breaking so she called Scott's father, in the hopes he could calm the situation. Scott, however, "broke through the door with an unknown object, and the debris struck Tonia." He also grabbed the phone she was holding and threw it, breaking it. Neighbors called for police, who then arrested Scott for Assault 4th and Intimidating a Witness in the Legal Process. On August 11, Louisville officers again responded to Tonia's home, and Tonia stated that Scott had kicked in the front door and had assaulted her with a sword. He was found in a friend's basement, along with drugs and paraphernalia. He was arrested for Burglary 1st, Assault 4th, Possession of Drug Paraphernalia and Contempt of Court.

While in jail, Scott had a number of phone conversations with Tonia. (The record did not indicate who initiated the calls, although it noted that Scott was under a no contact order at the time.) The recordings of those calls were used to obtain a Tampering with a Witness charge. He was ultimately convicted and appealed.

ISSUE: Is contacting a witness and suggesting ways testimony can be falsified Tampering with a Witness?

HOLDING: Yes

DISCUSSION: Hess argued that there was insufficient proof that he had, in fact, tampered with Tonia as a witness. The Court reviewed the numerous recordings, in which Hess "encouraged Tonia to mold her testimony in a way that would be most beneficial to his case," and "plainly suggested ways for Tonia to avoid having to testify and ways for her to falsify her testimony for his benefit." He also accused her of lying and providing false written statements to the police, although no statements appear in the record. Finally, he argued that it wasn't clear under which subsection of the statute, KRS 524.050, he was actually convicted. The Court, however, found that it was immaterial, because either theory was supported by substantial evidence.

Hess's conviction was affirmed.

DUI

Loveless v. Com.
2010 WL 2540179 (Ky. App. 2010)

FACTS: On October 25, 2008, Loveless attended a party in Boone County. His friend, Adams, picked him up at about 11:30 p.m. Two cousins followed in another vehicle. As Adams entered the highway, he sped up to avoid being rear-ended. However, Adams lost control of his vehicle and flipped over in a ditch. The people in the vehicle behind them stopped to render aid and observed both men get out of the car, but they could not tell which was driving.

When police arrived, they "detected the odor of alcoholic beverages on or about Adams." Loveless appeared intoxicated. Adams stated the Loveless had been driving. Loveless first denied but eventually admitted he had been driving. He failed field sobriety tests and admitted to having taken Adderall.

Loveless was charged with DUI under aggravating circumstances along with a suspended license charge. The two trials were severed, with the suspended OL tried first. However, although the only issue in that trial was whether Loveless was driving, the prosecution introduced evidence as to his "lack of sobriety." Loveless was convicted and appealed.

ISSUE: Is intoxication relevant evidence in a suspended OL charge?

HOLDING: No

DISCUSSON: Although Loveless's attorney did not object at the time, Loveless argued that the admission was palpable error. The Court noted that:

> KRS 189A.090 provides in relevant part that a person guilty of driving on a revoked or suspended license, third or subsequent offense within a five-year period, shall be guilty of a Class D felony and have his license revoked by the court for two years "unless at the time of the offense the person was also operating or in physical control of a motor vehicle in violation of KRS 189A.010(1)(a), (b), (c), or (d), in which event he shall be guilty of a Class D felony and have his license revoked by the court for a period of five (5) years." KRS 189.090(2)(c). The indictment charged Loveless with the aggravating circumstance of operating while revoked or suspended while under the influence.

However, the presentation and instructions did not address the aggravating circumstances, The Court agreed that "evidence of Loveless's lack of sobriety might ordinarily have been admissible to prove the aggravating circumstance (and to prove the DUI charge), but the Commonwealth moved to sever the DUI charge and then forego prosecution of the aggravating factor in the trial of the suspended license charge." The Court found no relevance to the revoked or suspended charge in the case at bar since they were not pursuing the aggravating circumstances.

The Court agreed that the evidence of intoxication may have swayed the jury to find against him on the suspended OL charge, as the "evidence was not overwhelming." (The Court agreed, as well, that it was error to allow a "deputy sheriff to testify as to the effects of Adderall on the body of a person who has ingested it.")

Loveless's conviction was reversed and the case remanded.

Lee v. Com.
313 S.W.3d 555 (Ky. 2010)

FACTS: On November 28, 2007, at about 6:50 p.m., Lee was stopped in Hardin County. He was arrested for DUI and the Intoxilyzer returned a reading of .209. He requested a blood test and was taken to Hardin Memorial Hospital. The doctor refused to do the blood citing, as there was "no medical basis" to do so. Lee was returned to jail. Ultimately he took a conditional plea after his motion to suppress was denied, the trial court ruling "that the police officer had made reasonable allowances for [Lee} to have a blood alcohol test and, therefore, was in compliance with the statute."

Lee appealed and the Circuit Court affirmed the trial court's decision. Lee further appealed.

ISSUE: Must an officer take a subject for an independent test when the first location refuses to do the test, when the individual does not ask to be taken to another location?

HOLDING: No

DISCUSSION: The issue before the Court was whether the "actions of the police officer were sufficient to accommodate [Lee's] right under KRS 189A.103(7) to have an independent blood test performed by 'a person of his own choosing.'" In Com. v. Long, the court had "adopted the 'totality of the circumstances' approach to determine whether the officer made a reasonable effort to accommodate the request for

independent testing."[8] The Long Court had also approved five factors that were developed in a non-Kentucky case: "(1) availability of or access to funds or resources to pay for the requested test; (2) a protracted delay in the giving of the test if the officer complies with the accused's requests; (3) availability of police time and other resources; (4) location of requested facilities; and (5) opportunity and ability of accused to make arrangements personally for the testing."

In this case, the court noted, there was no indication that Lee "requested a particular medical provider for the test." Nothing suggested that the officer "had reason to suspect that that hospital or that doctor would refuse to perform the test."

The Court continued:

> Two pivotal facts loom over this case:
>
> First, there is no evidence that [Lee} requested a second test. Had he done so, then the five factors in Long would have been implicated.
>
> Secondly, there was no evidence of bad faith of the officer. More particularly, there was no showing that the officer knew, or even had reason to know, that the doctor at Hardin Memorial would refuse to administer the test. Obviously, the officer had no authority over the refusing physician.

The Court also agreed that a subject charged with DUI is "required to be informed of their right to an independent test at least two different times." But that was not an issue in this case because Lee "obviously knew of his rights by requesting an independent test."

The decision of the lower court was upheld.

Sigretto v. Com.
2010 WL 1508166 (Ky. App. 2010)

FACTS: On August 29, 2008, an Owen County deputy saw Sigretto driving erratically and stopped her. She was ultimately arrested for DUI and taken to the Owen County Hospital for a blood test. Sigretto was given 15 minutes to try to contact a lawyer and was unsuccessful, although she did talk to her brother. She was then asked to consent to a blood test and refused.

About 5 minutes later she got a call back from an attorney, who advised her to take the test. She then told the deputy she would take the test but he did not allow her to do so. Sigretto argued at a subsequent hearing that she changed her mind within five minutes and that they were still at the hospital. When the trial court denied the motion, she took a conditional guilty plea and appealed. The Circuit Court upheld the trial court's ruling and Sigretto further appealed.

ISSUE: Does a single refusal invoke the additional penalty?

HOLDING: Yes

[8] 118 S.W.3d 178 (Ky. App. 2003).

DISCUSSION: The Court reviewed the statute and noted that "a single refusal triggers the adverse consequences which are intended to promote compliance." Nothing in the statute provided for a second chance. The Court agreed that the trial court "noted that if Sigretto were allowed to change her mind after 5 minutes, the question would be raised whether 7 or 9 or 11 minutes would also be close enough to allow for a recantation of an initial refusal." The Court found requiring an officer "to wait for an accused to change his or her mind" … "would led to an absurd result by rendering the statutory language meaningless."

The court upheld the decisions of the lower courts.

Com. v. Rhodes
308 S.W.3d 720 (Ky. App. 2010)

FACTS: On September 11, 2008, Officer Felinksi (Lexington PD) stopped Rhodes and arrested her for DUI. As he was putting her in the car, "she became combative," and fought against the seat belt. It took two officers to secure her. She was taken to the jail and into the Intoxilyzer room. She became belligerent and broke free from the officers holding her, and they had to chase her down. She refused to walk back and fought being put into a chair. At one point, a third officer had to assist.

"Officer Felinski testified that it was impossible for him to complete a reading of the implied consent warning to Rhodes despite trying on multiple occasions." He stated that he "felt" that she would refuse to take the test even though he was never able to actually make the request. The trial court ruled that her actions constituted a refusal but the Circuit Court reversed that decision.

The Commonwealth appealed.

ISSUE: Is a full reading of the implied consent required?

HOLDING: Yes

DISCUSSION: The Commonwealth sought an exception for a full reading of the implied consent warning for officers faced with unruly, belligerent subjects. The Court noted that the language of the statute made it mandatory to read the warning, but also noted "there is no statutory requirement that the defendants understand or acknowledge the reading of the implied consent warning."

The Court continued:

> In defending the decision not to read the implied consent warning to Rhodes, Officer Felinkski stated that given Rhodes' conduct, he feared for his safety and that of the other officers. While [the Court] certainly sympathize[d] with the officers and under[stood] that their safety is of utmost importance, Rhodes was in handcuffs with three officers present, and [the Court did] not see how reading the warning to a handcuffed defendant would put the officers at any further risk.

The Court found the argument to be without merit, and ruled that given that she "was never presented with the implied consent warning, she simply could not have refused to submit to the exam." The Court reversed the ruling against Rhodes.

CONTROLLED SUBSTANCES

Saxton v. Com.
315 S.W.3d 293 (Ky. 2010)

FACTS: On January 7, 2006, an informant arranged for Saxton to meet them at a motel that was close to the county high school. Saxton was convicted on multiple counts of trafficking, including one count of trafficking within 1,000 yards of a school, in Graves County. He appealed.

ISSUE: Must a drug seller know that there is a school nearby to be charged with Trafficking near the school?

HOLDING: No

DISCUSSION: Saxton argued that the prosecution was required to prove that he "knowingly" did the sale within 1,000 yards. The Court found there to be no mens rea (state of mind) requirement in KRS 218A.1411, and found that to be a deliberate action. Despite a lengthy argument, the Court agreed that the mental state according to trafficking was enough, and that it was unnecessary to prove that the actor knew of the proximity of the school, as that was not "conduct" in the usual meaning of the term.

The Court concluded that "discerning and effectuating the legislative intent is the first and cardinal rule of statutory construction."[9] The Court would not read into the statute something that the General Assembly did not place there.

He also argued that he was entitled to an entrapment argument, since he did not select the location. The Court agreed that the **"**mere fact that the confidential informants set up the drug transaction for a location within 1,000 yards of a school does not suffice as probative evidence of entrapment to drug traffic in violation of KRS 218A .1411 ." The Court agreed that he was not entitled to an entrapment instruction to the jury.

His conviction was affirmed.

Finn v. Com.
313 S.W.3d 89 (Ky. 2010)

FACTS: Finn was stopped in Laurel County and eventually convicted of DUI. The officers found a cigarette pack inside a work glove, which contained marijuana and a glass pipe with suspected cocaine residue, along with a scouring pad. They also found a white pen casing with residue. Finn agreed that he'd been smoking cocaine but stated that it was all gone. No drugs were found in his blood but urine tests were positive for cocaine. At trial, the lab technician testified that both items were positive for cocaine, but

[9] Toy v. Coca Cola Enterprises, 274 S.W.3d 433 (Ky. 2008). .

that "because police put the glass pipe and the pen casing inside the same evidence bag, it was possible that one had contaminated the other." He also stated that the "actual amount of cocaine was on a microscopic level and could not be seen by the naked eye."

Fin was charged with Possession of a Controlled Substance and Paraphernalia. He was convicted of possession and appealed.

ISSUE: Is there a minimum amount of a controlled substance required to place a Possession charge?

HOLDING: No

DISCUSSION: Fine argued that the amount was so small that he could not be charged with its possession. The Court, however, stated that the "law did not require that the amount of cocaine or other controlled substance exceed some minimum quantity threshold." "Possession of any amount -- no matter how small --- of a controlled substance suffices for a first-degree possession of controlled substances conviction so long as the person has knowingly and unlawfully possessed the substance."

The Court continued:

> We recognize that the mere possession of microscopic amounts of a controlled substance, by itself, without evidence that the defendant knew he possessed such a substance, would not satisfy the statutory elements of first degree possession of a controlled substance. But when a defendant possesses even a microscopic trace or residue of a controlled substance and the evidence shows that the defendant knowingly possessed it, we find no error in the defendant being convicted of first-degree possession of a controlled substance.

The Court agreed that it was not necessary for the prosecution to "directly prove that the defendant was in possession of the substance in a measurable quantity or a quantity visible to the naked eye when other evidence shows that the defendant knowingly possessed a controlled substance without legal justification."

Finn's conviction was affirmed.

SEARCH & SEIZURE - SEARCH WARRANT

Adams v. Com.
2010 WL 2025104 (Ky. 2010)

FACTS: On February 17, 2008, Officer Parker (Madison County area agency) received a tip that Adams and Owens were manufacturing methamphetamine at a specific location. Owens owned the property but later claimed had not been staying there, as he was evading an arrest warrant. Adams, however was apparently residing there, although he denied it, claiming to have been living with his girlfriend elsewhere. Investigation revealed that Adams and Owens (and identified friends) had both been buying pseudophedrine in the area between August and October, 2007.

Officers went to the house and found a number of people present. Owens arrived in response to a call from one of the occupants. Adams was there, and stated that he lived there. Officer Parker believed he smelled ether and found "on the cluttered porch" a "propane tank with a rubber hose attached and a jar containing a clear liquid." The officer knew both indicated the proximity of a lab. (The tank was later showed to be unrelated to any criminal activity.)

Although Owens agreed to a search, the officers elected to get a search warrant. They found a number of items related to manufacturing and items containing residue. Both were charged. Adams moved for suppression, arguing that the warrant was flawed, but the trial court denied the motion. He appealed.

ISSUE: Will errors in a warrant invalidate it?

HOLDING: No (but see discussion)

DISCUSSION: The Court reviewed the warrant, prepared by Officer Johnson. It read, in relevant part:

> *. . . In plain view on the front porch Detective Parker observed a propane tank with a piece of hose sitting on the front porch and also detected an order [sic] that he believed to be ether, an item commonly used in the production of methamphetamine. At that time Detective Parker asked that [sic] occupants to exit the residence .*
> *Your affiant responded to the residence after speaking with Detective Parker who stated that there were numerous persons at the residence. While at the residence your affiant observed a clear glass quart size jar with a clear unknown liquid sitting in plain view on the front porch. From training and experience your affiant knows that clear glass jars are frequently used in the production of methamphetamine. Also in plain view on the front porch your affiant observed the above described propane tank that is commonly uses [sic] with a gas grill. There was not a gas grill in the area of the propane tank and the gas grill was located on the opposite side of the porch. The propane tank had a plastic or rubber hose placed on the valve . Your affiant has also seen this used in the past in the process of manufacturing methamphetamine. The propane is used in the Birch Reduction process of manufacturing methamphetamine, and further used to make anhydrous ammonia which is an ingredient that is necessary for the illicit production of methamphetamine. Beside the propane tank, a piece of rubber or plastic hose was observed that had been fitted with a brass type fitting that appeared to be consistent with the valve on the propane tank on the porch.*
> *From training and experience, your affiant knows that the above described items are commonly used by persons manufacturing methamphetamine using the Birch Reduction or "Nazi" method. The affiant has received Clandestine Laboratory Investigations Training from the Drug Enforcement Administration (DEA) and has been involved in the investigation of numerous Methamphetamine Labs and the arrest and prosecution of persons involved in manufacturing methamphetamine. From training and experience, the affiant knows that the above listed items are ingredients and items that are commonly utilized in the illicit manufacture of methamphetamine.*

The Court continued:

> To attack a facially sufficient affidavit, it must be shown that (1) the affidavit contains intentionally or recklessly false statements, and (2) the affidavit, purged of its falsities, would not be sufficient to support a finding of probable cause."[10] "Statements in an affidavit that are intentionally false or made with reckless disregard for the truth must be stricken."[11] "After setting aside the affidavit's false material, if the remaining content of the affidavit is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search must be suppressed." Id. "It is not enough for defendants to show that the affidavit contains false information; in order to obtain a Franks hearing, defendants must make a `substantial preliminary showing' that the false statements originated with the government affiant, not with the informants, or that the government affiant repeated the stories of the [informant] with reckless indifference to the truth."[12] "[T]he fourth amendment does not require `that every fact recited in the warrant affidavit is necessarily correct, for probable cause may be founded upon hearsay and upon information within the affiant's own knowledge that sometimes may be garnered hastily.'. "Under Franks, suppression is required only when the affiant deliberately lied or testified in reckless disregard of the truth."

The court noted that although in this case, some of the items found were innocuous, "it does not follow that Officer Johnson intentionally or recklessly included false information in his affidavit." His observations were related truthfully, as were his corresponding statements linking the items to manufacturing. The issue of the ether smell was "more problematic," since no source for it was ever found. "While there [was] no readily apparent explanation for the absence of an apparent source of the smell," it was for the trial judge to decide upon his credibility. Even stricken from the warrant, however, there was still sufficient evidence to support it.

Adams also argued that it was improper to consider him in possession of the items found, but the Court agreed that from the purposes of KRS 218A, possession includes both constructive and actual possession. Although he denied at tried that he resided there, saying only that he "stayed there" on occasion, witnesses (including his friends and mother) testified to the contrary and evidence supported that he lived there.

After resolving several other issues, Adams's conviction was affirmed.

SEARCH & SEIZURE - CONSENT

Stanfill v. Com.
2010 WL 1253223 (Ky. App. 2010)

FACTS: On July 13, 2007, Officers Jackson and Garland (Pennyrile Narcotics Task Force), Officer Mighell (Calloway County SO) and Officer Hendricks (Probation and Parole), went to Stanfill's home. They were looking for two wanted fugitives. It was unclear who had initiated the search or provided the tip that they might be found at that location. When Jackson got out of his car, however, he saw several people and detected an "incredibly strong" odor he identified as ether. He thought it was coming from an outbuilding. He later testified that his training and experience indicated there was a methamphetamine lab in the area.

[10] Com. v. Smith, 898 S.W.2d 496 (Ky. App. 1995) (citing Franks v. Delaware, 438 U.S 154 (1978)).
[11] U.S. v. Ayen, 997 F.2d 1150 (6th Cir. 1993) (citing Franks). .
[12] U.S. v. Giacalone, 853 F.2d 470 (6th Cir. 1988). .

Officer Jackson gathered everyone on the property. Stanfill stated he owned the property and lived in the main trailer with Keyes. He stated he did not own the outbuilding but did have some items there. He gave consent to search it. Officer Jackson opened a refrigerator sitting on the porch and found a drug generator, and later stated that Stanfill "had a look of shock on his face when he saw the 'generator.'" Officer Jackson then arrested everyone.

He had also noticed a "padlocked deep freezer behind the outbuilding and inquired as to its contents." Stanfill denied owning it but admitted that he had a key. He gave Officer Garland the keys and gave consent. There, they found "an illegally modified propane tank and a modified oxygen tank which tested positive for anhydrous ammonia." Stanfill and Keyes were arrested. Pursuant to a search warrant, the officers got a search warrant and "found various items of drug paraphernalia, ingredients used to make methamphetamine, and some finished product." Another man, Smith, was arrested for violating probation terms. At trial, the defense tried to implicate Smith in the crimes. Witnesses also testified that Smith was involved in methamphetamine and had cooked on Stanfill's property, allegedly without his knowledge. (Smith supposedly "felt badly" about Stanfill's arrest, but that he could not take responsibility because he faced a lengthy sentence for violating his probation.) Smith conceded at trial that he may have been on Stanfill's property during the relevant time frame and had talked to Stanfill about tires and a title. He had skipped a meeting with Hendricks and was arrested for that violation. He agreed he'd been previously charged with methamphetamine trafficking.

Thomas testified that she was on the property that day and that she and Keyes had smoked methamphetamine, but she stated that Stanfill was not around.

Stanfill was convicted of various related charges and appealed.

ISSUE: Does common authority over an area permit a consent?

HOLDING: Yes

DISCUSSION: Stanfill first argued that the officers' reasons for being on the property was pretextual because of the discrepancies in the testimony. The Court also failed to issue an order for the 911 and dispatch logs, although Stanfill was told he was entitled to them. However, Stanfill never formally asked for the material to be provided. The Court did not agree that the officers' arrival "was improper or constituted a warrantless 'search.'" There was no evidence that the officers "penetrated into those areas of Stanfill's property where he had a reasonable expectation of privacy, or went beyond the 'invadable' curtilage."[13] Once Jackson smelled either, he was justified in questioning the individuals present at the scene.

The Court noted that the officers did seize jars of a substance identified as ether but that they were destroyed before testing. The Court, however, agreed it was reasonable to accept that the officers had detected ether on the premises.

Stanfill also argued that the prosecution had failed to prove he could give a valid consent over the areas in question. The Court noted that "[t]he test for whether third-party consent is valid is whether a reasonable police officer faced with the prevailing facts reasonably believed that the consenting party had common

[13] Quintana v. Com., 276 S.W.3d 753 (Ky. 2008).

authority over the premises to be searched."[14] However, the Court stated, it was only necessary to explore whether Stanfill had common authority when he wasn't the actual owner of the building, which he was. He also had a key to the locked freezer. Stanfill contested that he gave a voluntary consent of the freezer, since he was already in handcuffs by that time. The Court, however, gave credence to the testimony of the officers, all who stated that Stanfill gave consent - and further, had he refused, the officers stated they would have simply gotten a warrant. (They did not, however, share that intention with Stanfill.) The Court upheld the decision that the consent was voluntary.

Further:

> Stanfill argued that the police testimony regarding the odor of ether was contradicted by certified weather reports which showed that wind patterns would have made it impossible for the officers to detect such an odor from the direction of the outbuilding. Stanfill submitted certified weather charts showing wind speeds, wind direction, and wind gusts for the date, time, and location in question, and asked the court to consider the charts as newly discovered evidence under CR 60.02(b). Stanfill also argued that 911 and police dispatch logs were never provided to him as he had requested. He contends that the logs were potentially exculpatory in nature because they could have contained information refuting the officers' testimony that they were dispatched to Stanfill's property to serve a warrant on a fugitive or fugitives.

The Court, however, found that the charts were merely cumulative evidence and there was no indication that they would have changed the result. (The 911 and dispatch logs had already been addressed, as the Court noted that he never actually asked for an order for their production.)

The Court upheld most of Stanfill's convictions, although it did find a minor error with one charge and dismissed that charge only.

Bottoms v. Com.
2010 WL 2010755 (Ky. App. 2010)

FACTS: At about 2:30 a.m., on May 15, 2008, Officer Jared (Lexington PD) was patrolling when he spotted a passenger in Bottoms' car was not wearing a seat belt. Officer Jared made a traffic stop. He obtained Bottoms' OL and ran it through the computer, which indicated two possible warrants. He sought confirmation and learned the possible warrants were through the sheriff's office and that it would take a few minutes since there were several variations of Bottoms' name. After 10-15 minutes he further inquired, because the time was running on the traffic stop. The officer was also concerned because there were 4 people in the vehicle. Since there were other officers at the scene, he asked Bottoms to get out and come back to talk to him at the cruiser. Office Jared explained the situation with the warrants and asked for consent to search the vehicle. Bottoms allegedly gave consent, which he later disputed. Officers searched the vehicle and found a firearm in the trunk. Rental paperwork indicated Bottoms was the authorized person with the car. Bottoms was also a convicted felon and was arrested.

When they arrived at the jail, the warrants had still not been confirmed. Bottoms requested suppression. The trial court concluded that the stop was valid and that the "duration of the stop was not unreasonable

[14] Nourse v. Com., 177 S.W.3d 691 (Ky. 2005).

due to the particular facts and circumstances of the case." The Court also found that his gesture toward the car, when Officer Jared asked for consent, was a "non-verbal consent" to the search.

Bottoms took a conditional guilty plea, and appealed.

ISSUE: Does detention invalidate a consent?

HOLDING: No

DISCUSSION: Bottoms first argued that the length of the detention made the subsequent consent invalid. The Court however, noted that the "constitutionality of this detention had no bearing on whether the evidence obtained from the vehicle must be suppressed." The sole issue was the validity of the consent. The Court agreed there was a factual issue as to whether a consent had been, in fact, given. However, the trial court found the officer more credible and agreed that verbal, or at least non-verbal, consent had been given.

Bottoms also argued that running the warrant check was unreasonable in the context of a seat belt stop. However, since that issue wasn't brought up previously, the Court declined to address it in the appellate hearing.

Bottoms's plea was upheld.

SEARCH & SEIZURE – PROTECTIVE SWEEP

Guzman v. Com.
2010 WL 2010865 (Ky. 2010)

FACTS: On September 10, 2008, at about 1 a.m., Officer Krugler (Lexington PD) responded to a call from Wallace, Guzman's neighbor – who alleged Guzman was dealing in drugs and prostitution. The apartment was actually rented to Guzman's boyfriend, who was incarcerated. Officers interviewed Wallace, who claimed to have seen two men enter the apartment. As they were talking, one of the men, Demerit, left the Guzman apartment and the officers stopped him. He appeared to be high and told them he was just hanging out with a friend there. He gave consent and the officers searched his person and his vehicle, finding nothing.

The officers proceeded to the apartment to do a knock and talk. It took several minutes for Hendren, the other visitor, to answer the door. Officer Krugler later testified that "while she was waiting outside, she could hear moving inside the apartment and that she heard people walking around." When the door opened, Krugler "saw Guzman lying on a mattress on the floor that was directly in front of the door." Hendren admitted they had been having sex. Guzman gave consent for the officers to enter as she dressed under the covers. With the light on, Officer Krugler saw a blanket tacked over an interior door and asked if anyone else was there. Guzman replied that there wasn't, but Krugler did a "protective sweep of the apartment to ensure that there was no one who could harm the officers." In the kitchen she spotted a "large kitchen spoon" that was "burnt on the bottom," indicating narcotic use. She picked it up and saw white residue on it. Both Guzman and Hendren denied any knowledge of it. Krugler asked for consent to search for narcotics and Guzman asked "what would happen if she refused." Krugler responded that

Officer McAllister would stay in the apartment while Krugler went to get a warrant – at which point Guzman gave consent. The officers searched, finding cocaine and paraphernalia.

Guzman was charged and requested suppression. The Court denied the motion. Guzman took a conditional guilty plea and appealed.

ISSUE: Is a protective sweep proper when officers legitimately believe others might be present in a home where an arrest is made?

HOLDING: Yes

DISCUSSION: Guzman argued that the search was unlawful. The Court, however, noted that a "protective sweep is a recognized exception to the warrant requirement."[15] Such a sweep must be predicated by a "reasonable belief based on specific and articulable facts that the area to be swept harbors an individual posing a danger to those on the arrest scene."[16]

Looking at the combination of facts available and keeping in mind that "courts should use caution in limiting the ability of police officers to protect themselves as they carry out missions which routinely incorporate danger," the Court agreed the sweep was proper.

Guzman's plea was upheld.

SUSPECT ID

Gist v. Com.
2010 WL 2326542 (Ky. App. 2010)

FACTS: On April 1, 2008, a cash advance store in Louisville was robbed. Marshall, the clerk, recognized the robber as a prior customer as Gist, even though he was partially masked. She was able to locate a receipt with his information and gave it to the police.

One of the responding officers, who had not yet been given that information, independently found a witness who directed him to Gist's apartment – as the location where the robber had fled. Officer Manning knocked. Gist entered and provided ID. When the officers realized his connection to the crime, he was taken outside, not in handcuffs, so that Marshall could view him. Even though he'd changed clothes, she immediately identified him, from 20-30 feet away, as the robber.

Gist was transported, given Miranda warnings and confessed. He was indicted. Gist moved for suppression, which was denied. Gist took a conditional guilty plea and appealed.

ISSUE: Is a show-up identification permitted?

HOLDING: Yes

[15] Maryland v. Buie, 494 U.S. 325 (1990).
[16] See also U.S. v. Hatcher, 680 F.2d 438 (6th Cir. 1982).

DISCUSSION: The Court looked the process of the identification, using the two step process developed by Dillingham v. Com.[17] First, the Court analyzed whether the process was unduly suggestive. If it was not, the analysis ends and the ID is accepted. If it is suggestive, as showups are, inherently, the ID may still be admitted if the totality of the circumstances overall made it reliable.[18] The Court applied the five Biggers factors, and noted that first, Marshall had ample opportunity to see the robber, especially given that she'd seen him multiple times in the two weeks previous to the crime. He was wearing the same clothing each time, the same clothing he wore in the robbery. She recognized his voice and facial features and was able to quickly match him to a customer file. The show up occurred immediately following the robbery. She positively identified him during the showup.

The Court found the identification to be reliable and upheld his conviction.

INTERROGATION - QUARLES

Smith v. Com.
312 S.W.3d 353 (Ky. 2010)

FACTS: On April 24, 2003, Louisville police executed a search warrant at the Smith home. "In executing the warrant police used what was characterized as a "dynamic entry," which involved ramming the door open to gain entry into the residence ." Smith was at home with her two pre-teen children. Upon entering the bedroom where Smith was located, Sgt. Gentry "immediately handcuffed her and, without advising her of her rights pursuant to Miranda v. Arizona, asked her if she had any drugs or weapons on her." Smith replied that there was something in her pocket, and Gentry found crack cocaine there. She was eventually charged with trafficking, but ultimately convicted of possession.

> After recovering the cocaine, Gentry arrested Smith and escorted her into the living room where she was met by Detective Scott Gootee . Gootee testified that pursuant to normal routine, he then gave Smith the Miranda warnings; however, no other witness recalled this and the trial court concluded he had not. The record is unclear about what prompted Smith to make her next comments, though there was testimony that one of the officers may have said something about the children being present and whether they could be moved elsewhere. In any event, Smith made statements to the effect "well, I knew this was going to happen one day so that's why I've told my kids this may happen one of these days", and that she "was not a big drug dealer but just did it to get by." In effect, the statements amounted to an admission of drug dealing.

The statements were initially suppressed by the trial court, but reversed its decision upon a motion to reconsider. The Court held that "the statement made in the bedroom, implying she had drugs in her pocket, was held to be admissible on the basis that Smith was not in custody at the time she made it. The living room statements were held to be admissible on the basis that those statements were not made in response to any police inquiry designed to elicit an incriminating statement, and thus it was irrelevant whether or not she had been Mirandized."

Smith appealed her conviction.

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[17] 995 S.W.2d 377 (Ky. 1999).
[18] Neil v. Biggers, 409 U.S. 188 (1972); Savage v. Com., 920 S.W.2d 512 (Ky. 1995).

ISSUE: Does the Quarles exception to Miranda require a quantifiable public safety threat?

HOLDING: Yes

DISCUSSION: With respect to the first statement, the Court agreed that it "was the product of an un-Mirandized custodial interrogation." In reaching that decision, the Court asked "three questions: whether Smith was placed in custody for Miranda purposes as a result of being handcuffed; whether Gentry's questioning was interrogation; and if she was in custody for Miranda purposes and was interrogated, whether the public safety, or any other, exception applies to allow the admission of her statement."

With respect to the first question the Court looked at all the factors that have been used to determine custody:

> … the threatening presence of several officers; the display of a weapon by an officer; the physical touching of the suspect; and the use of tone of voice or language that would indicate that compliance with the officer's request would be compelled .[19]

Other factors which have been used to determine …

> … custody for Miranda purposes include : (1) the purpose of the questioning; (2) whether the place of the questioning was hostile or coercive ; (3) the length of the questioning; and (4) other indicia of custody such as whether the suspect was informed at the time that the questioning was voluntary or that the suspect was free to leave or to request the officers to do so, whether the suspect possessed unrestrained freedom of movement during questioning, and whether the suspect initiated contact with the police or voluntarily admitted the officers into the residence and acquiesced to their requests to answer some questions .[20]

The Court agreed she was in custody as the time she made the bedroom statement. Further, the Court agreed that the question was interrogation. The Commonwealth argued that "even if Smith's statement was a product of custodial interrogation, the statement was nevertheless admissible pursuant to the public safety exception identified in New York v. Quarles,[21] which we recently adopted in Henry v. Commonwealth.[22]" However, the Court agreed that the "interrogation of Smith was not made in relation to any quantifiable public safety threat.

Moving to the living room statements, the Court noted it was uncontested that she was in custody at that time.

> There was conflicting testimony at trial regarding the circumstances which caused Smith to make the incriminating statements. Some testimony indicated that Smith's statements were made spontaneously and were not in response to anything said by the police. If the

[19] U.S. v. Mendenhall, 446 U.S. 544 (1980)).
[20] U.S. v. Salvo, 133 F.3d 943 (6th Cir. 1998).
[21] 467 U .S. 649 (1984).
[22] 275 S.W .3d 194 (Ky. 2008).

> statements were made spontaneously, there is obviously no bar to the admission of the statements in trial and the trial court correctly denied the motion to suppress. However, Smith contends that she made the statements in response to an officer's comment to the effect that the children were present and could they be removed elsewhere . Even if we were to accept Smith's version of events as true, we are persuaded that the officer's comment cannot fairly be characterized as police interrogation, and thus the trial court correctly denied the motion to suppress .

As these statements were not the product of a custodial interrogation, they were properly admitted.

The Court reversed Smith's conviction as a result of the improper first statement.

INTERROGATION- MIRANDA

Overholt v. Com.
2010 WL 2471843 (Ky. 2010)

FACTS: On January 29, 2008, the parents of a young child went to Overholt's home in Logan County to accuse of sexually abusing the child. Overholt and his wife ran an informal daycare. They confronted him and then took the child for an exam – Trooper Bowles (KSP) met them there. Trooper Bowles when to Overholt's home; Overholt followed him back to the Logan County Sheriff's Office to discuss the situation. Trooper Bowles interviewed him for over an hour and Overholt confessed to several instances of sexual abuse with various children. He was indicted on 149 counts involving 10 victims, with allegations of various sexual acts.

Overholt moved to suppress the confession, which was denied. He took a conditional guilty plea and appealed.

ISSUE: Is an interview/interrogation at a police station inherently custodial?

HOLDING: No

DISCUSSION: Overholt argued that the interview was custodial and since he was not given Miranda warnings, it must be suppressed.[23] The Court noted that "the test for determining whether a person was in custody is whether a reasonable person would have believed that he or she was free to leave, considering the surrounding circumstances."[24] Overholt argued that when he was told to come to the sheriff's office, he believed he "was under arrest and had no choice but to follow Trooper Bowles to that office." However, at the beginning of the interview, the trooper specifically told him he was not and confirmed he'd come to the office voluntarily. He acknowledged at the end of the interview that he'd come there voluntarily and in fact, had driven himself there. He was never handcuffed or otherwise restrained. The room was small, the Court agreed, but the interview lasted only a little more than an hour. Overholt was seated near the door.

[23] See Callihan v. Com., 142 S.W.3d 123 (Ky. 2004).
[24] Baker v. Com., 5 S.W.3d 142 (Ky. 1999); U.S. v. Mendenhall, 446 U.S. 544 (1980).

The court stated that such determinations do not depend upon the individual's subjective belief, but "rather by whether a reasonable person would have felt that he or she was not free to leave." The court agreed that simply because it took place at the sheriff's office did not make it custody.[25]

Overholt also argued that the trooper's questioning tactics were coercive and consisted of "veiled threats." The Court reviewed the taped interview and characterized it as "firm urging to simply tell the truth." The Court found nothing to indicate, "either by tone of voice or language used, that compliance was compelled." No other coercive factors were present, either, "such as the presence of several officers, the display of a weapon by an officer, or physically touching the suspect."

The Court agreed he was not in custody and upheld the denial of the motion to suppress.

TRIAL PROCEDURE / EVIDENCE – DOUBLE JEOPARDY

Caudill v. Com.
2010 WL 1404428 (Ky. App. 2010)

FACTS: On February 16, 2008, Shelby and Debbie Caudill (a married couple) were drinking heavily at their Fleming County home. They got into a verbal argument and Shelby shoved Debbie. She had recently undergone a heart catherization and began to experience chest pain. Her daughter witnessed this and called 911. Shelby "began 'freaking out' that the police would come to the residence." Fire and EMS responders arrived, but refused to enter without law enforcement "as Shelby informed them they needed a warrant to enter." Fleming County deputies arrived and were admitted by the daughter. Shelby was bleeding from a cut lip, obviously intoxicated and may have been crying. They began to assess the situation, and listened to Debbie as she told them what had happened and that her chest hurt. Shelby got up from the couch where he was sitting and ran from the deputies.

Shelby led them out of the house and crashed through trees and underbrush. He finally tripped and the deputy fought to handcuff him. Finally, with the help of the other deputy and rescue workers, Shelby was finally subdued. He was placed in the cruiser where he "proceeded to bang his head against the cage and side window and kicked at the door. " After his arrest, Debbie reiterated that he had shoved her but that the chest pains were the only result.

Shelby was ultimately convicted of fleeing and evading in the first degree, resisting arrest and harassment – the Court apparently find the latter to be a lesser-included offense of the Assault originally charged. He was also PFO. He then appealed.

ISSUE: Is a Resisting Arrest and Fleeing and Evading charge necessarily double jeopardy?

HOLDING: No

DISCUSSION: Shelby argued that the fleeing and evading and the resisting arrest charge should have been merged as both charges arose from the same course of conduct. The Court reviewed the precepts of double jeopardy and concluded that double jeopardy does not occur "when a person is charged with two crimes arising from the same course of conduct, so long as each statute 'requires proof of an additional fact

[25] Oregon v. Mathiason, 429 U.S. 492 (1977).

which the other does not.'"[26] In this case, clearly each charge contains different elements, so double jeopardy did not attach.

Shelby also argued that the assault charge was inappropriate, but the court found there was at least a scintilla of evidence that the physical touching resulted in "Debbie almost immediately having chest pains." (He was, of course, aware of the procedure she'd had.) In any event, it was moot because he was not convicted of it.

The Court found affirmed the conviction.

TRIAL PROCEDURE / EVIDENCE – HEARSAY

Dalton v. Com.
2010 WL 2025102 (Ky. 2010)

FACTS: Dalton was convicted for the shooting homicide of Pitman, along with related charges. He appealed.

ISSUE: Must business records be introduced by an actual custodian of the records?

HOLDING: Yes

DISCUSSION: Among other issues, Dalton argued that the introduction of cell phone records belonging to Pitman and some of the suspects. The evidence was obtained from Cingular but introduced through the testimony of a police detective. Since the records were introduced for the truth of the matter asserted, the "records must clear the hurdle for the admission of hearsay evidence under KRE 803(6)." Because the records were not admitted through the custodian or another "qualified witness," the Court agreed that they were improperly admitted - stating that because the officer "had no personal knowledge of how Cingular established or maintained records of its customers' calls, or any other competent knowledge which would allow him to attest to the verity of the telephone records." He did not "did he have knowledge of specific calls or the length thereof, and nor were the self-authentication provisions of KRE 902(11) followed by certification of the custodian." However, since the testimony came in with a different witness as well, albeit in less detail, the Court found the error was harmless.

After resolving other issues, the Court upheld the conviction.

Martin v. Com.
2010 WL 2471866 (Ky. 2010)

FACTS: On February 20, 2008, in Paducah, Daniels saw a white pickup pull up in front of a social club. Martin got out and he and Daniels spoke. It escalated into an argument and Martin pulled out a gun. Daniels ran, but was shot. Martin approached him where he fell and shot him multiple times in the leg. Daniels survived. Martin fled the scene and went to Chicago, where he was located by the Illinois authorities. He was eventually extradited to Kentucky, and charged with Assault and PFO. He was convicted and appealed.

[26] Com. v. Burge, 947 S.W.2d 805 (Ky. 1996); Blockburger v. U.S., 284 U.S. 299 (1932).

ISSUE: Is some investigative hearsay permitted?

HOLDING: Yes

DISCUSSION: During Daniels's testimony, he testified that when he was first questioned by police, he denied knowing the name of the person who shot him. When the officer asked him if it was Martin, he agreed that it was. (Daniels's girlfriend told the officer that Daniels had told her that Martin was the shooter.)

The Commonwealth argued that the testimony "was allowed as an 'investigative verbal act' pursuant to Chestnut v. Com.[27],

> In Chestnut, this Court recognized that, while investigative hearsay is disallowed, there are limited circumstances where a police officer may testify to statements made to him: "The rule is that a police officer may testify about information furnished to him only where it tends to explain the action that was taken by the police officer as a result of this information and the taking of that action is an issue in the case."[28] Such testimony is then admissible not for proving the truth of the matter asserted, but to explain why a police officer took certain actions.[29]

The Court agreed that Martin's implication that the officer "suggested" the name "opened the door for allowing the Commonwealth to present what would otherwise be inadmissible hearsay testimony." "The testimony about what Lola Wilkes told Detective Smith was admitted, not for the purpose of proving the truth of the statement (the identity of the shooter), but to explain how Detective Smith knew to ask Daniels if the shooter was Dawan Martin."

Martin's conviction was affirmed.

Colvard v. Com
309 S.W.3d 239 (Ky. 2010)

FACTS: Colvard was accused of the sexual assault of two girls, ages 6 and 7. The girls knew Colvard and immediately reported it to their mother, who contacted the police. They were examined and interviewed and no DNA or other physical evidence was found, but the "examinations were not inconsistent with the girls' allegation of sexual assault." Colvard was convicted and appealed.

ISSUE: May testimony by a medical provider be considered hearsay?

HOLDING: Yes (but see discussion)

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[27] 250 S.W.3d 288, (Ky . 2008).
[28] Sanborn v. Com, 754 S.W.2d 534 (1988)
[29] Young v. Com,, 50 S.W.3d 148 (Ky.2001) .

DISCUSSION: Colvard objected to the testimony from several medical responders. In one case, an EMT testified that both children identified Colvard as the perpetrator in their injuries. He also objected to testimony being repeated by a doctor (from triage notes) as to the identity of the perpetrator. A pediatrician involved in follow-up care was also permitted to "testify as to the medical history provided by … the girls' mother." The trial court permitted all three under KRE 803(4), the medical diagnosis exception to the hearsay rule. The Court, however, noted, that the "general rule is that the identity of the perpetrator is not relevant to treatment or diagnosis."[30] In Edwards v. Com., however, the Court had "recognized an exception to the identification rule in cases where a family or household member is the perpetrator of sexual abuse against a minor in that household."[31] The Commonwealth argued that the "children may have considered [Colvard] a member of the family or household, as [he] had only recently ended his relationship with their grandmother" and lived in the same building.

The Court, however, upon reconsideration of Edwards, concluded that the decision in that case was **"**based upon an ill-advised and unsound extension of a traditional exception to the hearsay rule." As such, the Court overruled Edwards and J.M.R.

The Court continued, agreeing that the medical exception was motivated by the belief that a patient who believes such information is necessary for treatment is highly motivated to give truthful information. The Court agreed to "except from the hearsay rule statements made by a patient to medical personnel for the purpose of medical treatment or diagnosis." But, it concluded it was error to permit the testimony in question and that because the testimony "served to bolster the children's testimony and the Commonwealth's theory of the case, the testimony was highly prejudicial."

The Court cautioned, however, that its:

> … opinion does not alter or limit the traditional hearsay exception allowing medical providers to testify to a patient's out-of-court statements as to what was done to the patient and how he or she was injured . Nor, as the dissent implies, does this opinion impede or limit the ability of medical personal to report suspected child abuse, including information regarding the identity of a suspected abuser to the appropriate authorities . We simply state that we no longer recognize a special exception to the hearsay rule which allows medical providers to testify in court to the hearsay statements of a victim of sexual offenses which identify the alleged perpetrator because that identification is not pertinent to the medical treatment being provided.

The Court also excluded other, non-medical hearsay given by family members as to what they were told by the children. The Court further addressed testimony given by a forensic interviewer that questioned the children about the assault. The Court noted that the individual in question is, in fact, a social worker and "[t]here is no recognized exception to the hearsay rule for social workers or the results of their investigations."[32] As such, it "follows that there is no hearsay exception which would allow [the social worker] to testify to the children's identification of [Colvard] as having sexually assaulted them."

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[30] Souder v. Com., 719 S.W.2d 730 (Ky. 1986).

[31] See also J.M.R. v. Commonwealth of Kentucky, Cabinet for Health and Family Services, 239 S.W.3d 116 (Ky. App. 2007) (applying exception).

[32] B.B. v. Com., 226 S.W.3d 47 (Ky. 2007).

The Court overturned the convictions and remanded the case for further proceedings.

Burchett v. Com.
2010 WL 2218630 (Ky. App. 2010)

FACTS: On November 22, 2006, Deputy Bradshaw (Adair County SO) was serving papers when he learned of a reckless driver in the area. He found Burchett and witnessed the driving. He tried to stop her but she drove away quickly. Dep. Bradshaw pursued, assisted by Deputies Burton and Greer. When Burchett came around a curve, she almost struck Burton and then lost control, leaving the roadway and hitting several trees.

Burton found Burchett in the car, "lying on the floor and talking incoherently." Later blood tests confirmed the presence of cocaine. At her DUI trial, Dep. Bradshaw reported that he "kept getting reckless driving complaints on a gray car." Burchett objected that statement was hearsay, and the prosecution explained "that it was offering the testimony to explain Dep. Bradshaw's actions." The Court agreed and admitted the testimony.

Ultimately Burchett was convicted and appealed.

ISSUE: Is investigative hearsay admissible?

HOLDING: It depends – see discussion.

DISCUSSION: The Court reviewed KRE 801(c), and noted that the "analysis is one of relevance." The statements in question can only be admitted if relevant to the case, and "they are only relevant if used to explain why the officer acted as he or she did and the officer's actions are at issue." In this case, the Court did not conclude that the deputy's actions were, in fact, at issue, therefore, the Court should have excluded his "testimony regarding the reckless driving complaints."

However, upon further review, the Court concluded that the error was harmless. Burchett's conviction was affirmed.

Roach v. Com.
313 S.W.3d 101 (Ky. 2010)

FACTS: The family of Eba Wilson, age 90, realized that "several accounts written on her account had been forged." Although she was mentally alert until her death, her "eyesight had deteriorated to the point that she often had family members or her caretaker, Roach, fill in her checks, which she then signed." She also had a number of other physical infirmities, but tried to be as independent as possible. Her son, or her daughter-in-law, would read her bank statements to her every month and she remained very aware of her financial situation. However, due to their own medical problems, the family did not review the statements for several months. Wilson went to the hospital shortly after that, and never returned home, so Roach's employment ceased at that time. Her checking accounts statements were redirected to her son's home and when he reviewed the material, he found that several large checks, totaling $6,000, had been written to Roach and her daughter.

Her son initiated an investigation. Eventually Roach was charged with adult exploitation and multiple charges of criminal possession of a forged instrument. Roach asserted, however, that Wilson had simply loaned her the money. She was convicted and appealed.

ISSUE: May a lay witness testify concerning handwriting?

HOLDING: Yes

DISCUSSION: Roach argued that since Wilson was arguably able to manage her own affairs, that the charge of adult exploitation (KRS 209.990(5)) was improper. The court, however, did show that her "physical limitations forced her to seek assistance in managing her affairs." As such, the alleged actions fell under the purview of that statute.

Roach also contended that the testimony that the signatures were forged by the lead detective was improper, as he was not an expert. The Court, however, noted that Kentucky had "previously recognized the propriety of admitting such lay witness testimony when the lay witness is very familiar with the signatory's handwriting, and the testimony would be helpful to the jury." The Court noted that the detective himself stated he was not an expert, and the Court admitted his statement as lay witness opinion testimony under KRE 701. He never specifically stated the signatures were, in fact, forged. The Court concluded that the error, if any, did not unduly sway the jury.

Finally, Roach argued that hearsay was presented to the jury. The Court examined the record and concluded that "most, if not all, of the challenged hearsay appears to have been volunteered by witnesses rather than intentionally elicited by the Commonwealth and that the trial court sustained all hearsay objections lodged by Roach." Several of Wilson's statements came before the jury through other witnesses, as she had died prior to the trial, and her deposition had never been taken. The Court had, in fact, sustained all objections to the introduction of the testimony and had admonished the jury to disregard the improper statements.

She also objected to the lead detective being "allowed to bolster" the testimony of other witnesses. The detective was the law enforcement representative and was permitted to sit through the trial at the prosecution's table., and thus saw all witnesses before he testified as the final witness. The Court, however, found the admission of his testimony, which was consistent with the testimony of the earlier witnesses, to be of little concern, even if possibly error.

Roach's conviction was affirmed.

TRIAL PROCEDURE / EVIDENCE - PHOTOS

Phillips v. Com.
2010 WL 2471669 (Ky. 2010)

FACTS: During Phillips's trial for murder, photos of the shotgun blast wound on the back of the victim's head were shown to the jury. Phillips was convicted and appealed.

ISSUE: May gruesome photos be shown in evidence?

HOLDING: Yes

DISCUSSION: Although the photos were gruesome, the Court agreed that the photos were relevant to demonstrate that the victim was, in fact, killed by gunshot wounds. Further, the position of the wound, in the back of the head, was "relevant to refute Phillips's claim of self defense." In addition, "as a general rule, photographs do not become inadmissible simply because they are gruesome."[33] The evidence "loses its admissibility when the photographs depict a body that has been "materially altered by mutilation, autopsy, decomposition or other extraneous causes, not related to commission of the crime, so that the pictures tend to arouse passion and appall the viewer."[34] That threshold is very high.

Phillips's conviction was affirmed.

TRIAL PROCEDURE / EVIDENCE - ATTORNEY MISCONDUCT

Bronk v. Com.
2010 WL 2427424 (Ky. App. 2010)

FACTS: Bronk, age 17, was charged with murder, arson, and burglary for his involvement in a storage unit break-in and fire. Sgt. Nutter, Louisville Fire Department, died fighting the fire. Bronk's attorney, David Kaplan, was clearly lacking in his representation, and eventually, Bronk pled guilty to manslaughter, a lesser degree of Arson and 2 lesser counts of Bburglary. He was sentenced but moved to withdraw his plea, arguing ineffective assistance of counsel. That was denied. However, due to an intervening procedural case decision,[35] the Court was ordered to review his arguments.

ISSUE: Might attorney neglect cause a case to be overturned?

HOLDING: Yes

DISCUSSION: The Court reviewed the evidence, which indicated that Kaplan took very little interest in the case, did not communicate with Bronk and did not investigate in any way. He would leave Bronk unrepresented at hearings and in one case, sat in the back rather than at the defense table with Bronk and two co-defendants. In particular, he signed an agreed order allowing Louisville police to give Bronk a polygraph without him being present, but unfortunately, Bronk was given not one but three polygraphs and was interrogated at length, out of Kaplan's presence. Bronk then confessed to being a lookout during the crime.

The Court agreed that due process guaranteed Bronk a right to counsel and returned the case to the trial court for a further proceeding to determine if Kaplan's actions did, in fact, deprive Bronk of counsel.

[33] Foley v. Com., 953 S.W.2d 924 (Ky. 1997).
[34] Clark v. Com., 833 S.W.2d 793 (Ky. 1991) .
[35] Leonard v. Com., 279 S.W.3d 151 (Ky. 2009).

TRIAL PROCEDURE / EVIDENCE – WITNESS

Phipps v. Com.
2010 WL 2428126 (Ky. App. 2010)

FACTS: On April 15, 2006, Phipps and Cowan, roommates in Breeding, argued, but then "settled their differences and started to drink." When they ran out, they went to pick up more whisky. They then concluded they wanted to go to a party, but decided, having drunk all the whisky, that "they were too drunk to drive the distance to party." Instead, they drove to Cowan's girlfriend's (Miller) house, and she drove them to the party. When they arrived, they began to argue again.

> Soon the argument led to a physical altercation in the yard. Cowan stripped off his clothes. Wearing only his underwear, Cowan started throwing rocks at Phipps. Phipps got into his car and sped away. He lost control of his car and struck a tree. Despite the collision, Phipps turned the car around and drove past Grant's house.
>
> Once again, he lost control of the car and struck several mailboxes. Phipps stopped the car and walked back to the yard where Cowan and the other partygoers were still assembled. Cowan and Phipps briefly resumed their argument. Then Phipps got back in the car, drove toward Grant's house and ran over a fence. Miller was among the partygoers who remained in the yard. She attempted to run from Phipps's on coming car, but Phipps drove toward Miller and struck her with his car.

Miller, who was pregnant,. suffered serious injuries. Responding officers followed the investigation to Phipps home, and found him, intoxicated. He was arrested and charged with DUI, Assault and related charges. He was convicted and appealed.

ISSUE: If a witness is released from subpoena, may the defendant later object to evidence not being proven?

HOLDING: No

DISCUSSION: Among other issues, Phipps claimed that his blood alcohol test was improperly collected. Despite his claim that it was not properly authenticated, the Court noted that he agreed to release the nurse who drew the blood from her subpoena - after an officer testified that he witnessed the blood draw. Phipps did not object to the lab technician's testimony. The court found that the regulatory provisions were substantially complied with by the process.

Phipps's conviction was affirmed.

Ushyarov v. Com.
2010 WL 2428140 (Ky. App. 2010)

FACTS: On May 7, 2008, the Prides returned to their Louisville home and found an apartment window open. Dajuan Pride found burglars leaving and followed them to Ushyarov's car. He leaned into

the car and was dragged a short way. Officers finally stopped the car and found Pride's belongings. During that time, Pride when to a neighbor's home, who he knew to be friends with Ushyarov. He persuaded the neighbor, E.K., to turn over belongings and before police arrived, Pride struck E.K. in the head. Officer Davis, who arrived, took E.K. to the hospital for a head laceration, and E.K. confessed to the crime and implicated Ushyarov and O.V., another juvenile, in the burglary. They were both picked up. O.V. also confessed but Ushyarov denied any involvement.

At trial, both E.K. and O.V. testified that Ushyarov has simply driven the car, while Ushyarov said he had been "completely ignorant" of the burglary. He was convicted of Burglary and appealed.

ISSUE: May a defendant complain that other witnesses' statements are involuntary?

HOLDING: No

DISCUSSION: Ushyarov argued that the jury should have been instructed that they could consider the original statements given by the juveniles to be involuntary. The Court noted that Ushyarov never moved for suppression of the statements, for valid reason - the applicable Rule of Criminal Procedure "only applies to statements made by the *defendant*." "Here, Ushyarov is disputing statements made by *witnesses*." Since the jury had the opportunity to see the witnesses, the Court agreed that they had the opportunity to decide which of the witnesses to believe.

The Court also agreed it was unnecessary to give a self-protection instruction on Ushyarov's behalf, with respect the confrontation with Pride in the parking lot. The Court found the given instructions to be adequate.

Ushyarov's conviction was affirmed.

TRIAL PROCEDURE / EVIDENCE - PRIOR INCONSISTENT STATEMENTS

Rhodes v. Com.
2010 WL 2539763 (Ky. App. 2010)

FACTS: Rhodes admitted strangling and killing Williams, in Jefferson County, but he claimed self-defense. At trial, he was not permitted to testify as to what Williams said prior to her death, and he was not permitted to impeach the testimony of a witness with a "prior inconsistent statement." Rhodes was convicted and appealed.

ISSUE: Is a failure to remember a prior statement a prior inconsistent statement?

HOLDING: Yes

DISCUSSION: The Court agreed that Rhodes' testimony "may have been admissible to prove his state of mind," but the defense counsel did not offer an argument to that effect. As such, the appellate court could not review it.

With respect to the statement from the witness, the witness was permitted to read his statement to refresh his memory, but since it was five years before Rhodes was tried (he had fled the jurisdiction), it was not successful. Since the witness did not offer any testimony, the Court agreed that the "testimony was not inconsistent with his prior statement, but that he simply could not recall what he said." The Court, however, noted that "that no person should have the power to obstruct the truth-finding process of a trial and defeat a prosecution by saying, 'I don't remember.'"[36] "Prior statements have been deemed admissible as inconsistent with a witness's failure to remember either making the statement or the events reported in the statement." The Court agreed it was error not to admit the statement. However, the error was not preserved since "Rhodes did not proffer the transcript or audio tape of Jason's interview or otherwise offer the evidence by avowal." Further, the information in the statement did come before the jury during the testimony of the detective. As such, the Court agreed that the ultimate verdict was not impacted by the failure to introduce the witness's statement.

Rhodes's conviction was affirmed.

Conn v. Com.
2010 WL 1641113 (Ky. 2010)

FACTS: Conn was convicted of the fatal shooting of Riggs; Conn believed Riggs was responsible for the death of Conn's son in Florida. Riggs admitted that he shot him but claimed it was in response to a knife attack. Riggs had also requested an instruction for acting under extreme emotional disturbance, which was denied. He appealed.

ISSUE: Is a failure to remember a prior statement a prior inconsistent statement?

HOLDING: Yes

DISCUSSION: Conn first argued that one of the officers and another witness testified "to the effect that [Conn] made prior threats against Riggs." Conn objected at the time and a curative admonition was provided to the jury. Another officer, "Detective Gardner testified that he had heard through Roy Conn ([Conn's] nephew) that [Conn] was going to travel to Rowan County to 'take care of business.'" Gardner also testified that Mike Conn ([Conn's] brother) told him about a prior confrontation between [Conn] and Darrell Logan, in which [Conn] mistook him for Riggs. In addition, Jeff Fraley (a friend of [Conn]) testified that he had heard through Mike Conn that [Conn] would be coming to Rowan County to kill Riggs." Conn did not object to these statements, which the Court found were "properly introduced … for impeachment purposes." The two individuals quoted had stated that "they could not recall making prior statements indicating that [Conn] had threatened Riggs' life." The Court continued:

> It is well-settled that "the credibility of any witness, including one's own witness, may be impeached by showing that the witness has made prior inconsistent statements."[37] "A statement is inconsistent . . . whether the witness presently contradicts or denies the prior statement, or whether he claims to be unable to remember it."[38]

[36] Wise v. Com., 600 S.W.2d 470 (Ky. App. 1978); Manning v. Com., 23 S.W.3d 610 (Ky. 2000).
[37] Id..
[38] Brock v. Com., 947 S.W.2d 24 (Ky. 1997)

The Court also agreed that Conn was not entitled to an EED instruction, as there was no indication that "his judgment was so overcome with emotion that he acted uncontrollably in shooting and killing Riggs." In fact, his initial claim was that he acted in self-defense, and it was 24 days after his son's death and 22 days after he first believed Conn was to blame. That dissipated the effect and rendered "unreasonable any claimed explanation or excuse."

Conn's conviction was affirmed.

TRIAL PROCEDURE / EVIDENCE – GRAND JURY TESTIMONY

Caldwell v. Com.
2010 WL 2025124 (Ky. 2010)

FACTS: Caldwell was convicted of a robbery and assault that occurred in Hickman. He appealed.

ISSUE: Do mistakes made in grand jury testimony invalidate the indictment?

HOLDING: No

DISCUSSION: Caldwell argued that the indictment handed down by the grand jury should have been dismissed, because the testifying officer "gave false testimony before the grand jury and that such testimony grossly misled the grand jury." The error, specifically, was that "Caldwell had admitted in a taped interview to possessing the two guns while in Hickman, Kentucky, and to transporting the guns to Tennessee for the purpose of selling them." In fact, he admitted ownership of one of the guns, but not the other, and he did not state during the interview that he was taking the guns to Tennessee. The testifying officer mistakenly attributed statements to Caldwell that were actually made by someone else. The prosecution argued that he "merely erred in identifying the source of his information, but the majority of the information itself was accurate."

The Court agreed that Caldwell had failed to demonstrate a "flagrant abuse of the grand jury process or the consequent prejudice necessary to warrant relief." Although the officer was mistaken, there was no indication the information was provided intentionally or that it was material to the decision nor did it "fatally taint the proceedings."

Caldwell's conviction was affirmed.

TRIAL PROCEDURE/EVIDENCE - CHILD WITNESS

Howard v. Com.
318 S.W. 3d 607 (Ky. App. 2010)

FACTS: Howard was accused of sexual abuse of a 5-year-old female family member. At the time of the trial, she was 7 years old, and testified. The nurse at the hospital where the child was initially examined also testified as to what the child had told her at the time. He was convicted of First-Degree Sexual Abuse and appealed.

ISSUE: May a child be held competent to testify?

HOLDING: No

DISCUSSION: Howard argued that the child was not competent to testify because she was "not able to give particular examples of statements that were lies and statements that were truth." The Court stated that:

> The threshold question of witness competency in Kentucky is controlled by KRE 601. Under that rule, all persons are qualified to testify as a witness unless the trial court determines that they:
>
> (1) Lacked the capacity to perceive accurately the matters about which he proposes to testify;
> (2) Lacks the capacity to recollect facts;
> (3) Lacks the capacity to express himself so as to be understood, either directly or through an interpreter; or
> (4) Lacks the capacity to understand the obligation of a witness to tell the truth.

A witness is presumed to be competent, therefore the burden of proving that they are not falls to the person asserting the incompetence. The decision on a child witness falls to the discretion of the trial court. In this case, the court had an adequate competency hearing. Howard pointed to inconsistent statements, but the Court stated that Howard was confusing credibility with competency, "which are two different issues entirely."

Howard also argued that the nurse was allowed to testify as to statements the child made that indicated Howard was the perpetrator. The Court agreed that normally such statements would be inadmissible hearsay, but that "statements made for the purpose of medical treatment or diagnosis may be admitted as an exception to the general exclusion of hearsay."[39] Under the rule, "hearsay statements may be admissible if they are important to an effective diagnosis or treatment." The statements must describe medical history, past or present symptoms, pain, sensations, or the "inception or general character of the cause or external source" of the injuries. The Court agreed that normally the identity of the perpetrator would not qualify, but noted there was a special exception for when the perpetrator of child sexual abuse lived with the child, as there was an interest in stopping the abuse as well. Further, that information was needed for emotional treatment and support.

Finally, Howard argued that he was not permitted to introduce evidence that the child "could have been exposed to sex toys and pornography" which would have a bearing on her "sexualized behavior" that he raised as a defense. The Court agreed that KRE 412(b)(2) - the "rape shield" law - was in place for exactly such situations. The Court noted that it was not a defense for Howard that the child may have "initiated sexual contact because she was incapable of consent." The fact that she may have seen pornography does not excuse Howard's behavior.

After ruling on several other issues, Howard's conviction was affirmed.

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[39] KRE 803(4).

Barnett v. Com.
317 S.W.3d 49 (Ky. 2010)

FACTS: Barnett was convicted of the murder of Chief Randy Lacy, Clay City. Barnett did not deny that he shot Chief Lacy, but argued that he was intoxicated and suffered from "mental Health issues." He was convicted of wanton murder and appealed.

ISSUE: May jurors use their own notes during deliberation?

HOLDING: Yes

DISCUSSION: During the course of the trial, jurors were permitted to take notes. However, they were initially not permitted to take the notes into deliberations. Upon review and discussion, and after requesting a review of the first day of testimony, the judge agreed to let them use their notes, even though both sides objected. The judge also permitted them to specifically review certain testimony.

The Court noted that RCR 9.72 specifically permits jurors to take their notes into deliberations, despite a case to the contrary. The Court properly admonished the jurors that "their notes are not to be given any more weight than the memories of other jurors." The decision to have testimony replayed is "within the sound discretion of the trial judge."

Barnett also contended that the testimony of a witness to the effect that "he had been in court some and in trouble some" was prejudicial. The jury had been admonished to disregard the statement, and the court agreed that was sufficient to cure the error. The "statement was an unexpected response to an innocuous question by the prosecutor." The Court refused the request for mistrial on the issue.

Barnett's conviction was affirmed.

TRIAL PROCEDURE / EVIDENCE – TESTIMONY

Hodge v. Com.
2010 WL 1253181 (Ky. App. 2010)

FACTS: On September 27, 2003, shots rang out at a party in Hopkinsville. Kendrick was killed at another individual, Brodie, was wounded. A month prior, Brodie had argued with Hodge, at school, and both were suspended. Hodge and Brodie, along with Wallace, were at the party, which was held at the armory gym. Brodie and Hodge were dancing with the same girl when Hodge "apparently held his hand in the air, making a gesture with his hands and fingers as it he were firing a pistol at Brodie."

Wallace began to fight with Watkins, who was a friend of Brodie. Brodie walked toward the fight and later testified he saw "Hodge remove a gun from his pants and fire into the air." Haskins struck Hodge with a chair and knocked him down. Brodie was struck in the face by a bullet but did not realize initially that he'd been shot. He was taken to the hospital, not realizing that Kendrick had been killed by the same or another bullet. Two witnesses, Pendleton and Bradford testified at a second trial, but not at the first. Both were standing next to Kendrick when she cried out that "Malley [Hodge] shot me, Malley shot me."

Another witness testified that "all of Hodge's attention was focused on" Haskins, another individual with whom he'd been fighting that evening. That witness also heard Kendrick's statement. There was also testimony that 4 or more shots were fired and that others were carrying weapons. Officer Noiseworthy, who arrived in response to the shooting, testified that he heard shots and saw people trying to get out of the building. Haskins told him that Hodge had a gun and Noiseworthy went in pursuit on foot. He saw Hodge throw a gun over his shoulder before he was caught. Officer Cease did not see the gun tossed away, but found it based upon directions provided over the radio by another officer. He agreed that a large crowd had moved through the area before the gun was found. It was a revolver that could hold 7 rounds - four shell casings and three intact rounds were found in the gun. The gun was confirmed to have fired the fatal shot to Kendrick and also matched a bullet that struck inside the armory building. A bullet fragment from Brodie was too damaged to identify or positively link to the weapon.

Hodge testified that he was given a gun by a friend after he was knocked down, and that he saw Brodie reach for his waistline. He agreed he'd fired once in the air, and once more at Brodie. He stated he only fired twice but that he heard other shots as he ran from the gym. He testified that the gun found by the police was not the one he had used.

Hodge was charged with Murder, Assault and related charges, as an adult. He appealed. His initial case was overturned and remanded for a new trial. At the second trial, two witnesses who did not testify initially were identified and their statements sent to defense counsel, just before the start of the trial. No contact information for the witnesses was provided, however. The trial court refused to exclude the witnesses but did provide for the defense to meet with the witnesses prior to their testimony. He was eventually convicted of reckless homicide under extreme emotional disturbance.

ISSUE: May three witnesses be permitted to testify to the same event?

HOLDING: Yes

DISCUSSION: Hodge argued that it was improper to allow the two witnesses to testify, as their testimony "amounts to cumulative evidence causing undue prejudice." The Court noted that allowing "three witnesses testify to what they heard allowed the jury the opportunity to hear and compare three independent recollections of the evening's events." Although the statement was hearsay, it was permitted under the "exited utterance" exception to the hearsay law.

The Court agreed it was appropriate to allow all three witnesses to testify to the same event. Hodge's conviction was affirmed.

EMPLOYMENT – POLICE OFFICER'S BILL OF RIGHTS

Ratliff v. Campbell County
2010 WL 1815391 (Ky. App. 2010)

FACTS: Ratliff had worked for 15 years when he was fired by the Campbell County Police Department. When Chief Hill came across Ratliff's misconduct, during an investigation into another officer's conduct, he notified Ratliff that he was under investigation. Ratliff was interrogated and placed on paid administrative leave.

During the course of the investigation, Ratliff sent Chief Hill two e-mails in which Ratliff admitted to "recent actions" and "poor decisions." He was ordered to submit to a polygraph during which he admitted to having accepted two free drinks from local bars and "disclosing the names of an undercover informant to a member of the public." He was subsequently fired, on September 29, 2007. The termination letter listed twelve violations. Ratliff appealed and requested a hearing. He tried to prevent the department from actually presenting evidence on the violations. He argued that the process violated KRS 15.520.

The hearing was held on November 19. Following the presentation of evidence, the board met and affirmed the decision to terminate Ratliff. Ratliff further appealed to the Campbell Circuit Court, which remanded the matter back to the merit board, with instructors to "exclude Ratliff's testimony, Ratliff's statement, the polygraph, the testimony from Ratliff's interrogation, testimony by any officer about the polygraph, and any exhibits introduced by Ratliff or the police officer who had interrogated Ratliff." The merit board held a second hearing, and again, affirmed the termination. Ratliff appealed to the Circuit Court again, and this time, the termination was affirmed. Ratliff further appealed.

ISSUE: Does KRS 15.520 apply when a complaint is initiated internally?

HOLDING: No

DISCUSSION: The Court noted, first, that its role in an appeal from the merit board is not to retry the case, but to determine is the process met due process requirements. In this case, the "merit board's decision was supported by substantial evidence" and was thus not arbitrary. The second hearing was held with "redacted transcript and exhibits."

With respect to KRS 15.520, the Court concluded that it did not apply to this case, which was initiated by the chief. The Court stated that the "statutory language applies to police officers who are subject to citizen complaints as opposed to an internal investigation." As this was not initiated by a citizen, the provisions of 15.520 did not apply.

The Court agreed that the process, under KRS 78.455, was fair and provided adequate due process, the Court specifically noting that the hearing was "painstaking, long and fair."

The decision of the Campbell Circuit Court was affirmed.

Jones / Ellison v. Oldham County Sheriff's Dept / Merit Board
2010 WL 1508150 (Ky. App. 2010)

FACTS: Rob Jones and Ellison were both with the Oldham County Sheriff's Department. Deputies Button and Gadberry came to Jones about a "variety of concerns," including questions about Chief Deputy Ron Jones (no relation). Jones directed them to talk to the Sheriff, who advised them to put their concerns in writing. That was done and the list provided to Jones, who gave it to Sheriff Sparrow. The list was not signed because the deputies feared retaliation.

On March 15, 2006, Jones was placed on paid administrative leave pending an investigation into certainly things he had allegedly done. He was given an opportunity to respond. He gave a sworn complaint "asserting that Ron Jones had abused his authority on multiple occasions." He also provided a "longer list

of concerns similar to the one originally given." This version was signed by 4 deputies, including Rob Jones and Ellison. Ellison provided a sworn statement about a specific incident involving Rob Jones, and stated he had not come forward when it occurred because he was afraid of retaliation. Following the statement, however, Ellison was written on multiple times and was given a different shift. On July 18, 2006, Rob Jones was fired and he immediately appealed to the merit board. On August 23, 2006, Rob Jones and Ellison filed an action under the Kentucky Whistleblower Act, KRS 61.101 et seq. Rob Jones also alleged his rights under KRS 15.520 were violated, as he was not provided with a hearing within 60 days.

He also asked for a temporary injunction to prevent the merit board from having the hearing, but was denied. The hearing took place on September 12 and his termination was affirmed by the board. The Court ultimately dismissed the whistleblower action. Jones and Ellison appealed.

ISSUE: Does KRS 15.520 apply when a sheriff's office has a merit board?

HOLDING: No

DISCUSSION: With respect to the KRS 15.520 claim, the Sheriff's Office argued that Jones was not suspended but was placed on paid administrative leave. The Court, however, found that "there is no practical difference between a deputy sheriff being "suspended with pay" and "placed on administrative leave with pay." Jones was "relieved of his official duties and the emoluments of his office as deputy sheriff as a result of the charges against him." The Court found the argument to be an "exercise in semantics."

The Court then looked at the interplay between KRS 15.520 and KRS 70.260. The Court agreed that any conflict between the provisions of the statutes had to be resolved in favor of KRS 70.260. In other words, when there is a deputy sheriff merit board, that statute controls. Because that was the case in Oldham County, the Court found it unnecessary to address the issue under 15.520. The Court found that Jones's due process claim was correctly dismissed, as he received a hearing in the time required by KRS 70.260.

With respect to the Whistleblower claim, the court reviewed the elements:

> (1) the employer is an officer of the state; (2) the employee is employed by the state; (3) the employee made or attempted to make a good faith report or disclosure of a suspected violation of state or local law to an appropriate body or authority; and (4) the employer took action or threatened to take action to discourage the employee from making such a disclosure or to punish the employee for making such a disclosure.
>
> The disclosure had to be proven to be a "contributing factor in the personnel action." Both parties agreed that he met the first two elements, of course, but the sheriff's office argued that since he did not author the original list, he could not be protected by turning it over to the Sheriff. Jones, however, stated that although he didn't look at the final draft, he had seen earlier drafts and had provided information to the deputies who created the list.

The Court agreed that the timing of the leave was "immediately suspect." The Court found the information to be sufficient to, at the least, defeat the motion for summary judgment at this time. The Court did not agree that his loss before the merit board negated his KWA claim, stating that "as long as Jones's conduct was *a* contributing factor to the personnel action in question, his whistleblower claim is viable."

With respect to Ellison's claims, the Court agreed that the changes in schedule and disciplinary actions (none of which affected his pay) were not material - but addressed the issue as to whether non-material acts qualified as retaliation under the KWA. The Court agreed that he was required to "establish a materially adverse change" to qualify for KWA. The Court did agree that "the significance of any given act of retaliation will often depend upon the particular circumstances. Context matters."[40]

The Court affirmed the dismissal of Jones's due process claim and the decision against Ellison. It reversed the summary judgment with respect to Jones's claim under the KWA , however.

CIVIL LITIGATION

Haney v Monsky
311 S.W.3d 235 (Ky. 2010)

FACTS: Haney was working at a summer job, as a Louisville Zoo camp counselor. She was to work with small groups of children, age 6-8. She received training on-site on her duties. One of the activities she learned to conduct was a "Night Hike" - where the children would be blindfolded and walk in a line, using their senses. In June, 2005, one of the campers was Zeger (Monsky's son). During the activity, the leader "began to veer in a direction that would have led off the path" and Haney, watching, "cautioned the group." Several children tripped and fell, including Max, who suffered a fractured shoulder in the fall.

Monsky sued on behalf of her son, alleging that Haney was negligent. Haney argued that her activities were discretionary and she was thus immune, requesting summary judgment. The trial court, however, found her conduct ministerial and allowed the suit to go forward. Haney filed an interlocutory appeal and the Court of Appeals affirmed. Haney further appealed.

ISSUE: Is choosing how to do an action, between several possible ways, discretionary or ministerial?

HOLDING: Discretionary

DISCUSSION: The Court reviewed the standard for summary judgment, especially in the context of qualified official immunity. In such cases, "the analysis depends upon classifying the particular acts or functions in question in one of two ways: discretionary or ministerial."

Further:

> Qualified official immunity applies only where the act performed by the official or employee is one that is discretionary in nature . Discretionary acts are, generally speaking, "those involving the exercise of discretion and judgment, or personal deliberation, decision, and judgment.". It may also be added that discretionary acts or functions are those that necessarily require the exercise of reason in the adaptation of means to an end, and discretion in determining how or whether the act shall be done or the course pursued . Discretion in the manner of the performance of an act arises when the act may be

[40] Burlington N. & Santa Fe Ry. Co.v. White, 548 U.S. 53 (2006).

> performed in one or two or more ways, either of which would be lawful, and where it is left to the will or judgment of the performer to determine in which way it shall be performed.[41] On the other hand, ministerial acts or functions - for which there are no immunity - are those that require "only obedience to the orders of others, or when the officer's duty is absolute, certain, and imperative, involving merely execution of a specific act arising from fixed and designated facts."[42]

However, the Court continued:

> In spite of these often quoted guidelines, determining the nature of a particular act or function demands a more probing analysis than may be apparent at first glance . In reality, few acts are ever purely discretionary or purely ministerial. Realizing this, our analysis looks for the dominant nature of the act. For this reason, this Court has observed that "an act is not necessarily taken out of the class styled `ministerial' because the officer performing it is vested with a discretion respecting the means or method to be employed." Similarly, "that a necessity may exist for the ascertainment of those [fixed and designated] facts does not operate to convert the [ministerial] act into one discretionary in its nature." Moreover, a proper analysis must always be carefully discerning, so as to not equate the act at issue with that of a closely related but differing act.[43]

The Court focused on the question - whether Haney's supervision of the children in the Night Hike activity was a discretionary or ministerial function? The Court agreed it was up to Haney which activities she would conduct at any given time, which made it discretionary. With respect to her implementation of the activity, Monsky argued that her "training was such that her supervision over the children in conducting the Night Hike activity could not be a discretionary function." Her failure to keep the children on the path, the alleged ministerial function, was not a violation of such a strict rule that "her duty was inherently ministerial" - making her subject to suit. Unlike the activity complained of in Yanero, the Court found that the action "was a general and continuing supervisory duty to keep the children on the middle of the path which depended upon constantly changing circumstances - indeed, the continuing moment-by-moment, worm-like movement of all the children upon the path."

Further:

> The instruction did not in any way specify how to "keep" the children in the middle of the path should they suddenly stray from it. This is not to say that every rule or order must be exhaustively specific to make a general supervisory duty a ministerial function, but it must, at least, be sufficiently specific to restrict significant discretion in its enforcement.

The materials provided to Haney, on how to conduct the activity, consisted of a handout that included suggestions, not necessarily mandates. The Court agreed that "supervising the physical activity of others

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[41] Upchurch v. Clinton County, 330 S.W .2d 428 (Ky. 1959) .

[42] Yanero, 65 S.W .3d 510 (Ky. 2001) (citing Franklin County v. Malone, 957 S.W .2d 195 (Ky. 1997)) .

[43] Rowan County v. Sloas, 201 S.W.3d 469 (Ky. 2006) ("[T]he the portions of the investigative responsibilities as set out in the regulations . . were particular in their directive, but we noted that others, which required the exercise of judgment, were not. . . . The first part was ministerial, but what followed was held to be discretionary.") (emphasis in original) (citing Stratton v. Com. , 182 S.W.3d 516 (Ky. 2006)) .

is often a passive function in that an individual is broadly charged with ensuring the safety of the participants," in this case, she received some training but that "many of the activity's finer points were only briefly addressed and some not at all." The Court noted that it would have been "difficult for the training program here to foresee the many concerns and potential dangers that could arise during the counselors' supervision of the children in the numerous activities they could conduct." For that matter, it seems that few systems are capable of comprehensively training employees and officers and promulgating rules and regulations so as to anticipate supervisory uncertainties and thereby require certain actions in certain situations."

The Court concluded that "that supervising the conduct of others is a duty often left to a large degree - and necessarily so -- to the independent discretion and judgment of the individual supervisor." In this case, "[w]hen it came to ensuring the safe participation of the children in the Night Hike activity, Haney's training was largely silent on the matter and, to the extent that she was offered relevant instruction, it was broadly defined and not mandatory." With such silence, her duties "were those generally imposed to exercise reasonable care under the circumstances." As such:

> Taken alone, we do not believe those duties to be ministerial in nature and, indeed, should not be, lest we transform all general duties into ministerial acts and functions, thus eviscerating the doctrine of qualified official immunity. In this respect, it is worth remembering that a motivating policy of qualified official immunity is that officials who happen to be charged with duties that call for the exercise of their judgment and discretion should not be held personally liable to an individual for damages because such a result would "deter independent action and impair the effective performance of their duties." Indeed, we do not think it appropriate for the threat of liability to be imposed upon Haney where, in many instances, she was essentially asked to supervise the safety of the children to the best of her ability in an event that occurred in an unpredictable manner.

The Court concluded that "what tends to demonstrate the ministerial nature of an act or function is whether the alleged action or inaction is an identifiable deviation from an 'absolute, certain, and imperative' obligation - whatever its source - such that it requires 'only obedience' or 'merely execution of a specific act from fixed and designated facts .'" The "question of whether a particular act or function is discretionary or ministerial in nature is and, indeed, should be, inherently fact-sensitive." Although Haney received some minimal training, "a court must continue on and examine the training imparted as it related to the acts or functions alleged as tortuous or directly causing the event, all in an effort toward determining whether the training actually left the employer or official with significant discretion regarding the act or function at issue."

The decision of the lower court was reversed and the matter remanded for further proceedings.

Lawson v. Sword / Hunt and Pikeville Police Department
2010 WL 2428130 (Ky. App. 2010)

FACTS: On November 16, 2003, Officer Hunt (Pikeville PD) was notified that Lawson, who was wanted for possible involvement in a robbery, was at a local gas station. There he found that Lawson smelled of alcohol. He was given FSTs and failed; he was subsequently arrested for DUI. On the search incident, Hunt found rolling papers and what he believed to be marijuana. Lawson was taken to the hospital where he refused testing. He was charged.

At trial, the marijuana and rolling papers were not introduced because they had not been tested. (Apparently it was not tested because it was a misdemeanor case and it was believed it would end with a guilty plea.) Hunt testified he recognized it as marijuana because of his experience.

Lawson was acquitted. He filed a lawsuit against the officers and Pikeville on several issues, including malicious prosecution. The trial court initially dismissed the case, but the Court of Appeals (in an earlier action) reversed that decision, reinstating only the malicious prosecution claim. At trial, however, the trial court granted a directed version in favor of the officers and Pikeville, finding that Lawson had "presented no evidence to negate the finding of probable cause for his arrest."

Lawson appealed.

ISSUE: Does probable cause for an arrest negate a malicious prosecution claim?

HOLDING: Yes

DISCUSSION: Lawson argued that he was only arrested for DUI because the officers wanted to search his car to prove his involvement in the robbery. The court, however, found that Lawson "did not present any evidence" contradicting Hunt's assertion that Lawson was DUI. Further, the Court did not find it was error to exclude a urinalysis taken six hours after the arrest.

The Court resolved several other issues, and affirmed the verdict against Lawson.

Cabinet for Health and Family Services v. Hon. Chauvin (Judge) and Baumler / Warner
316 S.W. 3d 279 (Ky. 2010)

FACTS: Warner sought records (in civil discovery) of the Kentucky All-Schedule Prescription Electronic Reporting (KASPER) on Baumler. Under the authorizing statute, KRS 218A.202, civil litigants are not authorized to receive the information. The trial court recognized a conflict between that statute and CR 26.02(1), which permits discovery on "any matter, not privileged, which is relevant to the subject matter involved in the pending actions." The court ruled that he Warner showed good cause that he was entitled to the records, and the records were ordered conditionally released to Warner. The Cabinet sought a writ of prohibition to bar enforcement of the order, and the Court of Appeals denied it, agreeing that the statute violation the constitutional separation of powers doctrine. (The argument was that the statute improperly affected the "practice and procedure of the Court of Justice, and that the statute does not create a privilege" against disclosure.) The Court did agree to require the trial court do "an *in camera* review to determine what parts of the records, if any, were relevant discovery material before allowing any disclosure to the parties."

The Cabinet appealed.

ISSUE: May KASPER records be discovered in civil litigation?

HOLDING: No

DISCUSSION: The Court engaged in a lengthy discussion on how evidentiary privileges could be created, either by rule (procedural) or by statute (substantive). The Court agreed that the General Assembly had

the power to create privileges and that the "essence of a privilege is to prohibit disclosure, and thus also discovery." The statute clearly created that protection against disclosure in civil actions, even though it didn't use the "magic word" - privilege.

> The Court emphasized, however, that "the privilege may be unconstitutional as applied in some criminal cases.[44] This is because no statute can defeat a criminal defendant's constitutional rights to exculpatory evidence or to confront witnesses against him.[45] To summarize Bartlett, to the extent that the statute purports to prohibit the government from disclosing potentially exculpatory information in a criminal case, it would violate a criminal defendant's rights under the Fifth, Sixth and Fourteenth Amendments to the U.S . Constitution and Section 11 of the Kentucky Constitution . These constitutional rights must be vigorously protected by courts . However, as noted above, this applies only to certain discovery in criminal cases, and it does not require striking the entire statute down as unconstitutional.
>
> The Court noted that Despite the statute, parties to civil suits may still get information about a person's prescription drug history from more direct sources: physicians who prescribe drugs, pharmacists who dispense them, or from the drug recipient. What they cannot do is get the more convenient compilation of records the Cabinet has. The statute does not ultimately prevent a civil litigant from getting discovery of drug histories, nor does it ultimately prevent a court from deciding to admit the histories into evidence . This is reasonable ."

The decision of the Court of Appeals was reversed and the writ requested was ordered to be issue, to bar enforcement of the order.

MISCELLANEOUS - RAILROAD ACCIDENT

Whalen v. Norfolk Southern Corp.
2010 WL 1404409 (Ky. App. 2010)

FACTS: Whalen, along with his fiancé, Crabtree, and their two children were leaving McDaniel's property. They were attempting to cross a set of railroad tracks to enter Hwy 25, in Grant County, when they were struck by a Norfolk Southern train. The adults were killed instantly, but the children survived.

KSP investigated the accident. McDaniel was the only witness apart from the train crew, and he noted that Whalen was "traveling at a slow rate of speed and Whalen turned onto the crossing at the last instant without looking or slowing down." He also testified that the train had blown its horn at the last crossing and had continued to blow its horn as it entered the crossing. The train crew stated that "the car pulled into the crossing at the last instant." Visibility was good, the crossing is level and there was nothing to obscure the view of a driver.

The trial court entered summary judgment for Norfolk twice, having been asked to reconsider its first decision. The Estate appealed.

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[44] Cabinet v. Bartlett, 2010 WL 997374, --- S.W.3d --- (Ky. 2010).
[45] See generally Com. v. Barroso, 122 S.W.3d 554 (Ky. 2003).

ISSUE: Is a failure to sound a train horn at a crossing the proximate cause of a subsequent accident?

HOLDING: No

DISCUSSION: The Estate argued that "the amount of traffic using the crossing placed additional duties of lookout and warning upon Norfolk." The crossing in question is private, rather than public, and noted that Maggard v. Louisville & Nashville R.R. stated:

> . . . [a]t a private crossing the only duty of a railroad is to exercise ordinary care to save a person from injury after his peril is discovered by those in charge of the train. The person crossing the track must exercise ordinary care for his own safety.[46]

However, in Hunt's Adm'r v. Chesapeake & O. Rw. Co., the Court had stated:

> [w]hen a private crossing is used by the public generally with the consent of the railroad company, a duty devolves to give warning of the approach of trains; in other words, if a crossing is a public one, there is no doubt about the duty to give warning or signal; if the crossing is a private one and sufficient evidence is introduced to show habitual use of the crossing by the public, then this use may impose the duty of lookout and warning.[47]

The evidence indicated that there were about 8 to 10 crossings a day at the location, while the Hunt case indicated that there were no additional duties placed when as many as 125 crossings a day were made. The Court agreed that the number of crossing sin this case was insufficient to place an additional duty upon the railroad. Further, because there was no need to warn at all, the issue of whether the engineer sounded the horn is immaterial.

Further, the court discounted expert witness testimony that the train was speeding, as it was shown the speed was within federal guidelines and that the brakes should have been applied. The crew indicated that it saw the vehicle, but that its actions indicated it would stop and yield the right of way to the train, as required. "Instead, [it] pulled into the crossing at the last moment without looking." The engineer had no duty to take any action until the "peril was discovered."

The summary judgment in favor of the railroad was affirmed.

[46] 589 S.W.2d 508 (Ky. App. 1977).
[47] 254 S.W.2d 705 (Ky. 1952).

Sixth Circuit Court of Appeals

SEARCH & SEIZURE - SEARCH WARRANT

U.S. v. Bracey
2010 WL 2545493 (6th Cir. 2010)

FACTS: On April 8, 2006, after information from a CI was provided concerning Bracey dealing in cocaine, Officer Diaz (Detroit PD) obtained a warrant for a home. A quantity of crack cocaine, handguns and paraphernalia were found. Documents bearing Bracey's name, and medication prescribed to him, were also found.

Bracey was indicted on several federal offenses. He requested suppression, which was denied. Bracey was convicted and appealed.

ISSUE: Is a suspect's mere presence at a house enough to justify a search warrant for that house?

HOLDING: No

DISCUSSION: Bracey argued that the warrant did not support probable cause that evidence would be found in the residence. (He did not "seriously contest" that the warrant supported that he was involved in drug trafficking.) He contended that the warrant affidavit did not "establish any connection between that operation and the residence that was searched." It did not indicate the Bracey resided there or that drugs had been observed there. It did indicate the Det. Diaz had followed him from the residence to a location where he met with two people, presumably dealing drugs. An informant stated Bracey kept drugs at his home and surveillance indicated that individuals had "arrived at the … residence late at night and left after staying fewer than seven minutes."

The Court agreed that "a suspect's mere presence … at a residence is too insignificant a connection with that residence to establish that relationship necessary to a finding of probable cause."[48] The Court, however, found that the "executing officers relied on the warrant in objectively reasonable good faith."[49] As such, "several pieces of evidence connected Bracey's drug-trafficking operation to the … residence." The affidavit "was not so deficient that" the officer was operating outside good faith in relying on the warrant.

Bracey's conviction was affirmed.

U.S. v. Lazar
604 F.3d 230 (6th Cir. 2010)

FACTS: On October 9, 2002, a federal magistrate judge signed a search warrant for two offices in Memphis, Tennessee. The suspect in the case was Dr. Lazar, who was under investigation for health care fraud and deceit. The documents were duplicates except for the address. The attachment describing the items to be seized is as follows:

[48] U.S. v. Savoca, 761 F.2d 292 (6th Cir. 1985).
[49] U.S. v. Leon, 468 U.S. 897 (1984).

1. "Any and all documents and records . . . including but not limited to patient charts, files, medical records . . . concerning the treatment of any of the below listed patients, claim forms, billing statements, records of payments received . . . for the following patients:";
2. "Any and all information and data, pertaining to the billing of services . . . .";
3. "Any and all computer hardware . . . .";
4. "Any and all computer software . . . .";
5. "Any computer related documentation . . . .";
6. "Any computer passwords . . . .";
7. "If a determination is made during the search, by the Special Agent assigned to the computer aspect of this search, . . . that imaging or recreation of the computer hard drives will damage the seized information, you are authorized to seize the computers . . . ."; and
8. "All other records or property that constitutes evidence of the commission of the offenses outlined in the search warrant . . . ."

Lazar sought suppression.

The packet also included a list of patient's names for whom records were sought - there was later testimony that the list was not attached to the warrant and affidavit due to privacy concerns for the children involved. The lack of the list was noted by the Magistrate Judge that reviewed the packet of materials at a later date. There was confusion at the suppression hearing as to which of the lists entered into evidence during the hearing was the original list submitted the judge.

The original reviewing magistrate avoided the issue entirely, and simply held that the warrants lacked probable cause and that the judge viewing a patient list did not save the warrants from "facial invalidity."

The reviewing magistrate recommended, and the District Judge agreed, that the warrant should be suppressed. The government appealed.

ISSUE: Is a warrant which does not list with particularity the items to be seized facially invalid?

HOLDING: Yes

DISCUSSION: First, the court discussed whether the language of the warrant sufficed to "incorporate a patient list into the affidavit and warrants." The District Court had ruled that it did not, but the Court agreed that no special language was needed to incorporate by reference a separate document into a warrant.

The court looked to Groh v. Ramirez[50] for guidance. In that case, the Court noted that "[b]ecause [the officer] did not have in his possession a warrant particularly describing the things he intended to seize, proceeding with the search was clearly unreasonable under the Fourth Amendment." The Court found that this case, like Groh, "deals with particularization of search warrants and whether they are facially deficient." The Court agreed that the list was in front of the issuing judge, and ruled the suppressing the files that were on the list was in error. (However, it was appropriate to suppress files that were not before the judge.) Because the District Court, however, "did not make a finding as to which patient list came before the issuing Magistrate Judge" it could not "yet determine which patient records should have been suppressed."

[50] 540 U.S. 551 (2004).

The government argued that the inevitable discovery doctrine prevented suppression of the files which were not on the original list. It claimed "that it would have obtained the files suppressed by the District Court through use of a Department of Justice or grand jury subpoena. It points out that it had already used a subpoena to inspect some of the defendant's records. It asserts that it resorted to search warrants to diminish the risk that, if it subpoenaed the files, the defendant might either decline to produce or alter the subpoenaed files." The court, however, noted that "complications can readily arise from use of a subpoena." The Court agreed that "the inevitable discovery exception to the exclusionary rule applies when the government can demonstrate either the existence of an independent, untainted investigation that inevitably would have uncovered the same evidence or *other compelling facts* establishing that the disputed evidence inevitably would have been discovered."[51] Further, the Court found no evidence that the government "likely would have sought to acquire Dr. Lazar's records by subpoena, much less procured them in the same condition and as promptly as by seizing them with a warrant."

The case was remanded back for further proceeding on that issue. Even if the government need not show that it would likely have obtained the records as quickly and completely with a subpoena, it must at least show that it was ready to obtain them in that manner if, for any reason, it could not have done so—or would have chosen not to do so—with a search warrant.[52]

The court, however, did rule that there was sufficient probable cause and that a sufficient foundation had been laid "for a common sense determination that there was a fair probability that evidence of health care fraud—namely, the defendant's patient files and records—would be found at the defendant treating physician's offices."

The Court affirmed in part and vacated the prior decision in part, and remanded the case for further proceedings.

SEARCH & SEIZURE – SEARCH WARRANT – GOOD FAITH

U.S. v. Pirtle
2010 WL 1253812 (6th Cir. 2010)

FACTS: Around June 4, 2007, Det. Freeman began an investigation of drug selling around a specific address in Memphis (TN). He observed drug sales and also received a tip that "Red" was selling drugs out of a particular apartment. He made several attempts at corroboration, including observation of "walk up and drive up traffic." He obtained a warrant that read, in relevant part, as follows:

> *[A]ffiant Detective E. Freeman has been in the Memphis Police Department's Organized Crime Unit's Narcotics Section for the past three (3) years, and has participated in numerous narcotics investigations, arrest[s] and seizures. The affiant has attended several narcotics investigative school[s] including some sponsored by DEA.*
> *The affiant spoke to a reliable confidential informant whose information in the past has been found to be true and correct. The informant advised the affiant that a male known as "Red" was selling and storing cocaine at this location (4837 Tulane #3). The affiant*

[51] U.S. v. Kennedy, 61 F.3d 494 (6th Cir. 1995).
[52] U.S. v. Roberts, 852 F.2d 671 (2d Cir. 1988)

conduced surveillance on this location (4837 Tulane #3) and observed walk up and drive up traffic that is consistent with that of illegal narcotics activity. The informant, who has been at this location (4837 Tulane #3) within the past five (5) days of this warrant advised the affiant that this illegal narcotics activity is continuing. This occurred in Memphis, Shelby County, Tennessee.
He/she therefore asks that a warrant issue to search the person and premises of the sale a Male Black, approx. 6'1" tall, Short Hair, Light Complexion, Early 20's, approx. 140 lbs. and known as "RED" as above described in said County, where he/she believes said Crack Cocaine, Drug Records, and Proceeds is/are now possessed, contrary to the Laws Of the State of Tennessee.

The search ended with the seizure of drugs and a rifle. Pirtle was detained and later admitted to ownership of the items found. Later discovery noted that "Freeman did not specify in his affidavit that he had never worked with the confidential informant until the days prior to the search warrant was issued. He also neither mentioned details of his surveillance of the area, nor provided additional photographs that he had taken to document the traffic indicating drug sales were ongoing although one photograph was included with the affidavit. Freeman indicated that he limited the information in the affidavit in order to protect the identity of his confidential informant."

Pirtle was indicted in federal court for possession of the rifle. He moved for suppression. The Magistrate judge ruled that the warrant was supported by probable cause and even if not, was done in good faith under U.S. v. Leon.[53] The District Court, after a hearing, found that "although there was an insufficient showing for the establishment of probable cause," that the good faith exception did apply.

Pirtle was convicted and appealed.

ISSUE: Is a search under a warrant that does not demonstrate probable cause still valid?

HOLDING: Yes

DISCUSSION: The Court agreed that the "evidence was properly admitted under the good faith exception because there is nothing in the record to show that Det. Freeman did not act in good faith or was unreasonable in relying on the search warrant." In fact, the information that Det. Freeman did not include tended "to bolster the statement in the affidavit, rather than discredit it." (He had held back some detail to protect the informant.) The Court concluded the that "warrant contained indicia of reliability sufficient for an objectively reasonable officer to rely on its validity." There was "no falsity in the affidavit, implicating Franks v. Delaware.[54]

The Court upheld the warrant and the conviction.

[53] 468 U.S. 897 (1984).
[54] 438 U.S. 154 (1978).

U.S. v. Thomas
605 F.3d 300 (6th Cir. 2010)

FACTS: On October 25, 2005, TBI agents requested a warrant for a Nashville address. The warrant, by Agent Mabry, recited information he received from DEA Agent Hardcastle.

The relevant portion of the affidavit read as follows:

> *1. SA John Hardcastle with the Drug Enforcement Administration (DEA) recently met with a Confidential Informant (CI) who works for DEA. This CI provided information regarding [sic] illegal indoor marijuana grow operation located at 3971 Taz Hyde Road, Nashville, TN. This CI has worked with SA Hardcastle, and has given him reliable information within the past year. Information provided by this CI has led to the successful arrests and prosecution of three subjects who were arrested. Two were charged and convicted in Federal Court.*
> *2. The CI has informed SA Hardcastle that James I. THOMAS has had a reputation within the marijuana community of Nashville for the past two to three years as being a successful producer of just not [sic] leaf marijuana, but the more sought after "bud" of the plant, which is more expensive and produces a greater high for the user. Typically one ounce of the "hydroponically" produced bud will sell as for a high [sic] as $250.00 per ounce.*
> *3. The CI informed SA Hardcastle where James I. THOMAS lived. SA Hardcastle was able to confirm by [sic] THOMAS'S driver's license has the address of 3971 Taz Hyde Road. SA Hardcastle discovered that THOMAS has an active gun permit with the address listed as 3971 Taz Hyde Road. On 10-18-2005 at approximately 10:15 am, SA Hardcastle drove by the residence of 3971 Taz Hyde Road and observed THOMAS standing in the driveway smoking a cigarette.*
> *4. According to the reliable CI, he/she has been to the residence on at least three occasions and observed THOMAS conduct narcotic transactions. The CI has observed THOMAS exit the residence with marijuana and sell the marijuana to customers on at least three occasions.*
> *5. According to Nashville Electric Service, the subscriber to this residence is Sandra G. Brumit the girlfriend of James I. THOMAS. According to Metro Nashville Property records, Brumit is the owner of the property. The house has a finished area of 1059 square footage. SA Hardcastle pulled electricity records for that address from March 2005 through September 2005. The research conducted by SA Hardcastle revealed usage which SA Hardcastle and I believe to be high usage. The following information was provided by Nashville Electric Service (NES) to the [sic] SA Hardcastle for the electrical usage at 3971 Taz Hyde Road:*
> *March 2005 - $345.24*
> *April 2005 - $371.22*
> *May 2005 - $337.51*
> *June 2005 - $436.28*
> *July 2005 - $513.90*
> *August 2005 - $499.63*
> *Sept. 2005 - $530.46*
> *6. The following information was provided by the Nashville Electric Service (NES) to SA Hardcastle for the electric usage for the neighbor of THOMAS located at address of 3986*

Taz Hyde Road. The square footage of the residence according to the Davidson County is 1568 square footage of finished area.
May 2005 - $125.00
June 2005 - $181.64
July 2005 - $202.78
Aug 2005 - $221.89
Sept 2005 - $233.21
7. According to the NES records, THOMAS'S residence regularly uses more electricity than the neighbor. THOMAS pays twice as much a month on a regular basis which you [sic] affiant knows is something that is very common with indoor marijuana grow operations.
8. Indoor marijuana cultivation operations typically use large volumes of electricity to operate the advanced lighting systems used in such operations. An indoor grow operation can generate marijuana year round if the growing operation is managed properly. An indoor grower of marijuana will use a technique that is referred to as an "up cycle" to increase the lighting given to the marijuana simulate [sic] the coming of fall to make the marijuana plants to [sic] produce more "buds" on the plants.
9. NES disclosed to the Affiant that the January 2005 bill was for $745.00. Given the recorded square footage of the 3971 Taz Hyde Road location and the utility usage, it strongly appears that James I. THOMAS is "cycling up" on his utility usage which indicates that THOMAS is running a marijuana cultivation operation on the 3971 Taz Hyde Road location.
10. Davidson County property records reveal that there are at least two "out buildings" located on the property out of sight from the front of the property. Property records do not indicate that there are any other structures on the property that would legitimately use such a high volume of electricity such as a heated pool or air conditioned buildings other that [sic] the residence.

During the subsequent search, they found 128 marijuana plants and a large quantity of process marijuana, handguns, cash and motorcycles. This was all found in a freestanding trailer behind the main house, where Thomas, his girlfriend and their two children lived.

Thomas was charged and moved for suppression. At the hearing, Agent Hardcastle "essentially reiterated all of the information" in the warrant and denied making any intentional or reckless misrepresentations. He did admit that the CI"s statement about marijuana sales at the address concerned events that had taken place 8 months before, but stated that he considered the CI reliable. Thomas's mother, Brumit, who actually owned the property (not his girlfriend) stated that there were three buildings and a pool that all depended upon electricity.

The motion was denied because the Court found no indication that the officers "knowingly, intentionally, or recklessly made any false statements necessary to the finding of probable cause." It found the information to not be stale because it involved a "marijuana grow operation, which is entrenched activity and thus less subject to time constraints."

Thomas took a conditional plea and appealed.

ISSUE: May a warrant be read in its totality (rather than as a sum of its parts) to determine if it satisfies probable cause?

HOLDING: Yes

DISCUSSION: Although the court found the affidavit to be "a relatively thin justification for probable cause," the Court found that it did, in fact, support probable cause. The affidavit sufficiently detailed the CI's "positive prior record of giving accurate information to the police." The officers made an attempt to corroborate as much of the information as possible. Viewed individually and in a vacuum, each element was unpersuasive, but "viewed together and in totality, as required," the Court agreed it was sufficient.

Thomas focused on what the affidavit lacked, but the Court agreed that the electric usage records refreshed the arguably stale tip and properly compared the bills to a neighboring property. The officers viewed the property from the road and saw only two outbuildings, neither of which should account for much electricity usage. (The trailer was apparently hidden from the road.)

The Court also agreed that even if there were flaws, that the officers acted in good faith under Leon.[55]

Thomas's pleas was upheld.

SEARCH & SEIZURE - TERRY

U.S. v. McDaniel
2010 WL 1253811 (6th Cir. 2010)

FACTS: On January 29, 2006, at about 8 p.m., Officer Putnick and Grisby (Cincinnati PD) were patrolling when they came across a vehicle illegally parked. Officer Putnick pulled up alongside to "tell the driver to move the car closer to the curb." He saw the driver, who was McDaniel, "make a startled expression." All "four occupants stared with blank expressions as if surprised by the officers' presence." He saw McDaniel "turn away very quickly and make a furtive movements as if he was putting something into his waistband." He believed that indicated McDaniel was trying to conceal a gun. Officer Grisby interpreted it to mean he "might get out of the car and run," however.

Officer Putnick ordered the men to keep their hands in sight. They obtained ID and explained what was going on. The officers waited for backup before asking McDaniel to get out for the car. He was cuffed and frisked. Officer Putnick "felt a gravel-like substance in McDaniel's right sleeve which, based on experience, he believed to be crack cocaine." He continued the frisk, going over the waist area again, and "felt a gun, which slid down McDaniel's pant leg onto the ground." He also discovered a scale and cash.

McDaniel was indicted on multiple counts. Suppression was granted upon motion, and the government appealed.

ISSUE: Is a frisk valid when based upon articulable suspicion that an individual is armed?

HOLDING: Yes

[55] U.S. v. Leon, 468 U.S. 897 (1984)

DISCUSSION: The Court reviewed the standard of a Terry stop and frisk and noted that it is "constitutionally permissible if two requirements are met." "First, there must be a proper basis for the stop." "Second, to proceed from a stop to a frisk, the police officers must have reasonable suspicion that the person stopped is armed and dangerous."[56] Looking to the facts, the Court agreed that the stop was valid, and that McDaniel's actions supported Officer Putnick's reasonable suspicion that "McDaniel was armed and dangerous."

The suppression was reversed and the case remanded.

SEARCH & SEIZURE - CONSENT

U.S. v. Block
2010 WL 2025582 (6th Cir. 2010)

FACTS: In July, 2006, Ohio State police were seeking Block on outstanding warrants. The FBI brought in a fugitive task force to locate him and Agent Domonkos tracked Block to the home of Pleasure (his girlfriend). She answered their knock and told them that Block was not there. (They later learned he'd jumped out the window as the FBI had arrived.) They received another tip, some months later, that he was staying at another home and driving a particular car, which was registered to Minnie Brown.

On December 19, they set up surveillance on the address and vehicle. They learned that Pleasure was the tenant and she later said it was actually her sister who held the lease, but that she shared the residence with her. They set up a perimeter and then knocked, and heard "someone moving, running inside." The saw someone they believed to be Block looking out the window from upstairs. They forced entry and found Pleasure. They searched the premises and found Block. "In the course of searching the apartment for officer safety, the agents saw a large amount of cash sitting on a shelf in an upstairs walk-in closet."

Block was arrested. Pleasure signed a consent to search, although she later indicated she did not believe she had a choice and that the "police had already conducted a full search of the apartment." Following the consent, however, the agents searched and found the cash and a large quantity of crack cocaine. Block admitted ownership.

Block was indicted and requested suppression. The Court upheld the initial and the second search, and held he had no standing to object because he had no expectation of privacy there. Block took a conditional plea and appealed.

ISSUE: Does a valid consent negate other issues in a search?

HOLDING: Yes

DISCUSSION: Block argued that the agents lacked reason to believe he was present and that in order to search, they needed more. The Court noted that "when law enforcement must enter a third party's house to execute an arrest warrant, it is 'an open question in our circuit' whether the officers need a reasonable

[56] Arizona v. Johnson, 129 S.Ct. 781 (2009).

belief or probable cause to believe the suspect is present in the house before entry."[57] The court however, found they did not need to address that issue, as it agreed the agent reasonably believed he saw Block looking out the window.

The Court also upheld that Pleasure's consent to search was voluntary. Pleasure was an adult with a high school education and presumably understood the ramifications of signing a consent.

The Court upheld the conviction.

U.S. v. Clark
2010 WL 1924710 (6th Cir. 2010)

FACTS: On April 7, 2006, Clark went to Buchanan's home in Jackson, Tennessee. They had been dating for several months but Buchanan was planning a date with another man that evening. Clark and the other man arrived at about the same time. The other man wisely left. Clark and Buchanan argued, during which time Chandler (Buchanan's brother) called her. Discovering what was going on, Chandler, who was nearby, went to Buchanan's home as well.

Although the later testimony differed, the three argued and shots were fired. Chandler was injured. Clark fled the scene. Buchanan spoke to him on the phone and tried to convince him to turn himself in. On April 9, Buchanan told the police where he could be found and collected a reward. Officers found Clark in the parking lot and followed him to the room. He was handcuffed and searched - the room was also searched. Officer McClain and Randolph later testified the Clark gave verbal consent to search the rental car. (Clark testified that he did not give consent.) Officer Randolph found a loaded handgun in the vehicle, which was later turned over to the rental company.

Clark was indicted in federal court for being a felon in possession. He moved for suppression and was denied. Clark was convicted and appealed.

ISSUE: If a subject argues they were never asked for consent, may they later argue that they denied consent?

HOLDING: No

DISCUSSION: Among other issues, Clark argued that his consent was involuntary. The Court, however, noted that argument failed "because it directly contradicts his suppression hearing testimony." At suppression, he testified that he did not give consent because he was never asked. The trial court was "presented with two conflicting versions of the events" - that the police received consent or that they did not even ask - and the trial court found the first to be more credible. The Court upheld the decision of the trial court. (It did not need to consider an alternative argument by the government - that the firearm in the car would have inevitably been discovered when the rental car was checked by the company.)

After ruling upon several non-related issues, the Court upheld Clark's conviction.

[57] U.S. v. Hardin, 539 F.3d 404 (6th Cir. 2008).

U.S. v. Taylor
600 F.3d 678 (6th Cir. 2010)

FACTS: In March, 2008, Ohio task force members learned that Taylor was at an Elyria, Ohio, apartment. Although they had an arrest warrant, they did not have a search warrant for the apartment, which was apparently not his home. They went to the apartment and found Arnett, the female resident, who gave them permission to search for Taylor. Although she originally said he was not inside, she admitted it finally. They found Taylor hiding and brought him to the first floor. They asked Arnett for permission to search the apartment for "any other stuff," because of a suspicion of weapons in his background. The did not ask for permission to search Taylor's belongings, but having already seen men's clothes in a spare bedroom during the initial search, they returned to that bedroom and searched a closet. They found a shoebox (men's shoes) and inside found a handgun, ammunition and Taylor's jail ID band.

They questioned Arnett, who said Taylor did not live at the apartment but had been storing items in that closet.

Taylor, a felon, was indicted for possession of the gun. He moved for suppression, which was granted, with the trial court finding that "Arnett did not have actual or common authority to consent to a search of Taylor's belongings because Taylor had not granted Arnett access to his property." Nor did she have apparent authority over the shoebox. The Government appealed.

ISSUE: Does a container that obviously belongs to someone other than the person giving consent be searched pursuant to that consent?

HOLDING: No (but see discussion)

DISCUSSION: On appeal, the government dropped the argument of actual or common authority and relied solely on "apparent authority." The Court noted that the "apparent-authority doctrine excuses otherwise impermissible searches where the officers conducting the search 'reasonably (though erroneously) believe that the person who has consent' to the search had the authority to do so."[58] The burden to prove that belief falls to the prosecution.

The government argued that a shoebox isn't the type of container that "commands a high degree of privacy" and noted that other items (toys, children's clothes) were also in the closet. Taylor argued that the ownership of the box was at least ambiguous. The Court agreed that "the officers began the search with the reasonable belief that most items within the apartment were subject to Arnett's mutual use, given that she was the sole tenant of the apartment." The men's clothes were an argument, however, that someone else was using the room, and the shoebox lay under men's clothes. The trial court had ruled that the officers opened the shoebox specifically because they believed it belonged to Taylor. The Court noted that storing an item at the home of a third party did not reduce the expectation of privacy in the container. In Waller, the Court had listed "several factors that it took into consideration: (1) the type of container and whether that type "historically command[ed] a high degree of privacy," (2) whether the container's owner took any precautions to protect his privacy, (3) whether the resident at the premises initiated the police involvement, and (4) whether the consenting party disclaimed ownership of the container.

[58] Illinois v. Rodriguez, 497 U.S. 177 (1990). United States v. Waller, 426 F.3d 838 (6th Cir. 2005),

Applying these factors, the Court agreed that shoeboxes aren't normally private, they are "often used to store private items, such as letters and photographs." Taylor also had it closed and hidden under his own clothing. The Court compared to facts to other cases in which it had ruled that the search was proper, but found that "there was ambiguity over whether Arnett had mutual use or control of the shoebox." Given that both Arnett and Taylor were available to clarify the ambiguity, the Court agreed the search was improper.

The suppression of the evidence was upheld.

VEHICLE STOP

U.S. v. Hughes
606 F.3d 311 (6th Cir. 2010)

FACTS: On March 6, 2007, Officer Atnip (Nashville PD) was sitting in an unmarked car in an area that "at night is completely desolate and known to attract significant crime …." At about 11 p.m., he witnessed Hughes pull up near an intersection, blocking the road. The officer called for backup and continued to watch, believing that Hughes was "casing businesses." He maneuvered and pulled up behind Hughes' SUV. A few seconds later, the SUV pulled away, and Atnip followed, still waiting for backup. Officer Atnip finally pulled over the vehicle and approached on foot. Spotting loose marijuana on Hughes' shirt, Atnip asked about it. Hughes admitted to marijuana and a gun. A later search of the vehicle also revealed cocaine and crack cocaine. Atnip was not cited for the traffic offenses, but was later indicted under federal law for possession of the gun.

> Over time, first Atnip and then the government raised seemingly new explanations and justifications for the stop. On March 7, 2007 (the day following the stop), Atnip filed an Investigative Report, in which he declared that he had "stopped the defendant for possible theft investigation and to check his welfare (lost or intoxicated)." Several days later, Atnip testified at a State Preliminary Hearing, where he again stated that he had stopped Hughes both for suspicious activity and to check on Hughes's welfare. On cross-examination, Atnip added that he could have cited Hughes for "obstructing a passageway," but that he could not think of anything else for which he could have written a ticket.
>
> Following the State Preliminary Hearing, federal prosecutors assumed control of the case, and on December 12, 2007 Hughes was indicted on the federal charge that, as a convicted felon, he was knowingly in possession of a firearm in violation of 18 U.S.C. §§ 922(g)(1) and 924. Hughes then moved to suppress the evidence found in the SUV, arguing that Atnip's stop of the vehicle was illegal. The government responded by arguing that: (1) given the high-crime neighborhood, the time of night, and Hughes's odd behavior behind the wheel, Atnip had reasonable suspicion that the occupants of the SUV were engaged in criminal activity, and thus was justified in making a stop under Terry v. Ohio,and (2) regardless, Atnip *could* have stopped Hughes for violating various traffic ordinances or statutes, and so the stop was justified. During the district court's Suppression Hearing – held more than a year after the stop –the government focused almost entirely on the first of these arguments. In addition to testifying about his suspicion that Hughes was casing businesses, however, Atnip also testified that he could have stopped Hughes for violating: (1) Tennessee statute T.C.A. § 39-17-307,[1] which prohibits

> obstructing traffic; (2) Nashville Municipal Ordinance 12.24.060,[2] which prohibits drivers from entering intersections unless they have room to get through on the other sides; and Nashville Municipal Ordinance 12.40.080,[3] which prohibits parking in such a way as to obstruct traffic. Atnip then again stated that he had actually stopped Hughes for suspicious activity, to check Hughes's welfare, and for obstruction of a passageway.

Upon motion, the District Court granted the motion, finding that no reasonable suspicion for the initial stop. The Government appealed.

ISSUE: May a traffic stop be made for violation of a local ordinance?

HOLDING: Yes

DISCUSSION: Upon appeal, the Government raised a new issue, arguing that "Atnip could have stopped Hughes for violating a Nashville local ordinance, which prohibited parking in an intersection." The Court noted that in the lower court ruling, the Court was "clearly looking to Atnip's subjective intent" in making the stop. In Whren v. U.S., however, the Court made it clear that "the permissibility of a traffic stop turns not on subjective intent, but rather on objective fact." [59]

The Court noted that for a stop to be made on a traffic offense, however, "it is not sufficient for a police officer to know the facts that give rise to probable cause or reasonable suspicion; the officer must *also*, at the time of the stop." know or reasonably believe that those facts *actually* give rise to probable cause or reasonable suspicion.

> In other words, in order for traffic stop to be permissible under the Fourth Amendment, a police officer must know or reasonably believe that the driver of the car is doing something that represents a violation of law. This is not to say that officers must be able to, at the time of a stop, cite chapter and verse – or title and section – of a particular statute or municipal code in order to render the stop permissible. This rule might be better stated as saying that police officers may not look for after-the-fact justifications for stops that would otherwise be impermissible; following a stop, the government should not begin poring through state and local traffic ordinances looking for any that a suspect might have violated.

The Court noted that the last professed reason "*might* have provided probable cause for the stop." The Court reviewed the ordinances put forth by the government, but noted that "Given that Atnip did not mention this ordinance or issue until the Suppression Hearing, however, and that Atnip suggested at the State Preliminary Hearing that he had made the stop only for a "wellness check" and perhaps because of TCA § 39-17-307, the government has not demonstrated clearly that at the time of the stop Atnip had the requisite knowledge to justify the stop.

The Court remanded the case back to the trial court to determine if Atnip did, in fact, have sufficient cause to stop Hughes for violating the ordinance in question.

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[59] 517 U.S. 806 (1996).

INTERROGATION

U.S. v. Brooks / Lovelace
2010 WL 2161809 (6th Cir. 2010)

FACTS: On September 11, 2007, Burke and Comer were murdered in Rineyville. Sgt. Burke (the husband of one of the victims) was developed as a suspect. Det. Walker, KSP, went to Fort Campbell to question him about the homicides. Burke gave the names of Brooks and Lovelace as alibi witnesses, stating he'd been with them during the time the murders were committed. Agents with the Defense Criminal Investigative Service (DCIS) were asked to assist since the case involved military suspects. Agents spoke to both and noted some inconsistencies. Further inconsistencies arose when Lovelace gave a written statement, and she admitted that Burke asked that they say the three were talking at the time of the murders. When challenged, Brooks vacillated on the time she's been with Burke. Eventually, both women were indicted, tried and convicted of misleading the DCIS agents. Both appealed.

ISSUE: Is an interview at a workplace in custody?

HOLDING: No

DISCUSSION: Among other issues, specific to federal law and not therefore summarized, Brooks argued that her statements were made under custodial circumstances and without Miranda warnings. The Court noted that the interviews were taken in a side room of the workplace of the two women (the dispatch center.) Brooks consented to being questioned. Several breaks were taken, but she was never told she could leave. The agent stated he did not give her Miranda warnings because he did not consider it a custodial interview. The Court compared the circumstances to that in U.S. v. Mahan, and noted that "For an individual to be "in custody," there must be "a formal arrest or restraint on freedom of movement of the degree associated with formal arrest."[60] In determining whether a suspect is "in custody" for purposes of applying the Miranda doctrine, "the only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation."[61] As in Mahan, Brooks was "interviewed at work, he was never told that he was not free to go, the door of the interview room was unlocked, arrest was never threatened, and no show of force was made, such as the use of handcuffs or the brandishing of a firearm."

The Court agreed the interview was not custodial and affirmed the convictions.

Bray v. Cason
2010 WL 1610320 (6th Cir. 2010)

FACTS: Following up on a tip about cocaine dealers, Westland (Michigan) officers watched a residence over two sequential days, and a third day a couple of days later. They saw "Bray make frequent, brief stops at the apartment." On March 3, 2007, the last day, they saw him leave with a backpack. Officers followed him and stopped him, and found a large quantity of crack and powder cocaine. The residence was later searched and more drugs, paraphernalia and a gun were found.

[60] Thompson v. Keohane, 516 U.S. 99 (1995)
[61] Berkemer v. McCarty, 468 U.S. 420 (1984). See also Thompson, (stating that the custody determination hinges upon whether, "given those circumstances, would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave.").

Bray was arrested and given Miranda warnings. He fully confessed. He stood trial and was convicted in state court. He exhausted his Michigan appeals and sought habeas relief, that was also denied. He was granted leave to appeal.

ISSUE: Is a statement about possible leniency inherently coercive?

HOLDING: No

DISCUSSION: Bray first argued that his statements to the police should not have been admitted, because "the police led him to believe that if he provided a statement and cooperated with police, he might be prosecuted in federal court rather than state court" where he faced a higher penalty.[62] To determine if a confession is voluntary, the Court needed to "inquire whether, considering the totality of the circumstances, law enforcement overbore the will of the accused."[63] Although "police promises of leniency can be objectively coercive in certain circumstances, a statement about possible leniency upon cooperation does not render a confession unconstitutional."[64]

The Court looked to the Michigan decisions and agreed that Bray was not improperly made any promises.

Bray's petition for habeas was denied.

U.S. v. Hinojosa
606 F.3d 875 (6th Cir. 2010)

FACTS: Hinojosa came under investigation as involved in international transmission of child pornography - U.S. to Canada. Canadian officials referred it to ICE, which further investigation and tracked the transmissions to Hinojosa's home. Using both NCIC and LEIN (the Michigan state database), they learned there was a possible warrant for Hinojosa, although the two systems were inconsistent in several ways. (In fact, it was later determined the warrant was for someone else.)

Agents went to Hinojosa's home and spoke to his wife. They did not tell her they had a warrant, only that they needed to speak with Hinojosa. She allowed them to enter, telling them he was ill and lying down. They went to the bedroom, although she later contended that she did not give them consent to follow her nor did she realize they were behind her until they entered the bedroom. As they walked to the bedroom, they spotted several distinctive elements in the house that matched what they'd seen on video of Hinojosa in sexual situations with his daughter.

Agent George spoke to Hinojosa and requested consent to search the residence and the computer, both were denied. He was arrested and questioned, and ultimately confessed to having a sexual relationship with his daughter and that he'd produced pornography with her.

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[62] Bram v. U.S., 168 U.S. 532 (1897).
[63] Mincey v. Arizona, 437 U.S. 385 (1978).
[64] U.S. v. Craft, 495 F.3d 259 (6th Cir. 2007).

Agent Smith prepared an affidavit, summarizing what they'd learned. Hinojosa was indicted and moved for suppression. He was ultimately convicted and appealed.

ISSUE: Is an interrogation that takes place at a residence custodial?

HOLDING: No

DISCUSSION: Hinojosa first argued that the discrepancies between NCIC and LEIN should have "put the officers on notice that they were dealing with two unique individuals." The government did not dispute that "the relied-upon warrant" was for someone else. The Court, however, concluded that the officers entered under consent, and as such, "an arrest warrant was not a prerequisite for such entry." The Court reviewed the facts, and concluded that the "interaction between the officers and [the wife] was devoid of coercion or intimidation." His wife said they were polite and not "intimidating or aggressive in anyway." Agent George testified that he requested consent to follow her to the bedroom for "officer safety" and that the wife did not object.

The Court noted that Hinojosa's wife did not contradict that of the officer, "rather, she simply could not recall whether she was asked for permission to further enter the residence." The Court further noted that a verbal consent was not required and that her "non-verbal actions constituted valid consent."

Hinojosa also complained that his statements were improperly included in a subsequent search warrant affidavit. Hinojosa was questioned in his bedroom and the court found it "significant to [its] inquiry that the questioning occurred at [the] home." Such venues are generally not considered coercive. The interview consisted of only a few brief questions, no weapons were drawn nor threats made. He was not handcuffed or restrained. Notably, he "refused to consent to the further search of the residence, which suggests that the environment was not coercive."

Although he was not told he was not under arrest, that "failure to do so does not automatically render the encounter custodial." The Court agreed that simply because they fully intended to arrest him from the outset did not make the situation custodial.[65] The court agreed the questioning was not under custodial circumstances and that Miranda was not required.

Finally, the Court found that the arrest, while without a valid warrant, was still appropriate, since the officers had probable cause that he'd committed felonies. Their plain view observations could properly be considered in making that decision, as well. (In fact, the Court agreed the arrest was appropriate even without those observations.) Specifically, the Court ruled that an IP address registered to him, at that address, was sufficient probable cause in itself.

Hinojoso's conviction was affirmed.

[65] Berkemer v. McCarty, 468 U.S. 420 (1984).

TRIAL PROCEDURE / EVIDENCE - ENTRAPMENT

Al-Cholan v. U.S.
610 F.3d 945 (6th Cir. 2010)

FACTS: Al-Cholan was a native of Iraq and a naturalized citizen of the U.S. In October, 2007, he befriended Hanna, an immigrant from Lebanon, and confessed that "he harbored a predilection for sex with underage girls and boys." He asked Hanna to help him "procure a child" Hanna, however, relayed it to his guardian who passed it on to DHS/ICE. A sting operation was then set up, which Hanna "as a cooperator." Shortly thereafter, Hanna told Al-Cholan that he knew of a 12-year-old girl who was being prostituted by a family member in Toledo Ohio. Al-Cholan was initially reluctant to go to Toledo, but when told that the girl could not come to Detroit, he decided to make the trip. Hanna drove, and on the trip, Al-Cholan detailed his prior sexual experiences with minors, both in Iraq and in Michigan. (Most of the conversation was recorded.)

Upon arrival at the motel, Al-Cholan paid the ICE agent who was posing as the child's relative. He went into the room as directed and was arrested. He was given his Miranda rights in English and he signed an English-language waiver form. He was briefly interviewed and then taken to a nearby police station. During a longer interview, he made several inconsistent statements. A few minutes into the interview he began to act like he could not speak English and asked for an interpreter. The interview ended.

Al-Cholan was indicted on federal charges relating to interstate commerce for the purposes of engaging in the illegal sexual conduct. He moved for dismissal, arguing entrapment, and also argued to suppress his custodial statements. The trial court denied the motions. Al-Cholan was convicted and appealed.

ISSUE: Does a demonstrated predisposition to commit a crime defeat an entrapment claim?

HOLDING: Yes

DISCUSSION: Al-Cholan first argued that he was entrapped by the actions of the federal agents. The court inquired "whether law enforcement officials implanted a criminal design in the mind of an otherwise law-abiding citizen or whether the government merely provided an opportunity to commit a crime to one who was already predisposed to do so."[66] A valid entrapment defense requires proof of two elements: (1) government inducement of crime, and (2) lack of predisposition on the part of the defendant to engage in the criminal activity."[67] The Court looked to the following factors as relevant:

> [t]he character or reputation of the defendant, including any prior criminal record; whether the suggestion of the criminal activity was initially made by the Government; whether the defendant was engaged in criminal activity for profit; whether the defendant evidenced reluctance to commit the offense, overcome only by repeated Government inducements or persuasion; and the nature of the inducement or persuasion supplied by the Government.[68]

[66] U.S. v. Pennell , 737 F.2d 521 (6th Cir. 1984).
[67] U.S. v. Khalil, 279 F.3d 358 (6th Cir. 2002).
[68] U.S. v. Moore, 916 F.2d 1131 (6th Cir. 1990) (quoting U.S. v. McLernon, 746 F.2d 1098 (6th Cir. 1984)).

The Court concluded that it was "incontrovertibly establishe[d] that he was predisposed to commit the offense." Although he was reluctant to drive to Toledo, he was not reluctant to have sex with the proffered child. Al-Cholan argued that the out-of-state site was suggested by the government and that he did not want to go out-of-state.

The Court agreed that his entrapment defense failed.

With respect to the Miranda issue, the court agreed that "language difficulties may impair the ability of a person in custody to waive [his Miranda] rights in a free and aware manner."[69] However, the Court found no reason to question that Al-Cholan understood English well enough to properly waive his Miranda rights. As someone who had gone through the naturalization process, he had to demonstrate some proficiency in English and swear that he could speak and understand it. He spoke English to the agents and "did not indicate any lack of comprehension" when interviewed. He completed a medical questionnaire in English without difficulty. Therefore, "whether or not Al-Cholan truly understood the Miranda warnings, the agents certainly had no contemporaneous reason to doubt that he did."

Al-Cholan's conviction was affirmed.

TRIAL PROCEDURE / EVIDENCE - CHAIN OF CUSTODY

U.S. v. Logan
2010 WL 1461452 (6th Cir. 2010)

FACTS: On February 3, 2005, the Warrick County (Indiana) Sheriff's Department, during a drug trafficking investigation, did a controlled buy. Yancy and Rice, the sellers, later stated that they had accompanied White (a convicted drug dealer) to Logan's home in Madisonville. White made a purchase of cocaine and then gave it to Rice and Yancy to deliver to Gamble in Indiana. Instead, Yancy and Rice passed on the information to the Madisonville police. The police did surveillance as the transaction was made and the drugs were turned over the Det. Lantrip. He processed the evidence and turned it over to McKinney, the evidence technician.

Officers obtained a search warrant and found a number of items, powder and crack cocaine, marijuana, scales, a large amount of cash and a handgun. McKinney and Officer Carter processed the evidence and eventually, the drug evidence was forwarded to KSP.

The case was transferred to the ATF, but only $3,000 in cash (rather than the $5139 seized) was initially given to the agent. The agent realized it later and returned, receiving the remainder of the cash. However, he realized that "the bills in his possession" were not the same ones seized. He did verify that the gun was the proper one, however.

At trial, the defense was permitted to introduce evidence that McKinney had "mishandled the money and that the evidence room was in 'disarray.'" The agent testified that the room was disorganized and that things were not labeled. He agreed the McKinney had misappropriated money and that he was the subject of an ongoing investigation, led by himself. The defense was not allowed to introduce an audit report that substantiated this, however.

[69] U.S. v. Heredia-Fernandez, 756 F.2d 1412 (9th Cir. 1985).

Logan was eventually convicted, and appealed.

ISSUE: Is a flaw in the chain of custody always fatal?

HOLDING: No

DISCUSSION: The court noted:

> To admit physical evidence, the government must show "that the exhibit offered is in substantially the same condition as it was when the crime was committed."[70] "Absent a clear abuse of discretion, 'challenges to the chain of custody go to the weight of the evidence, not its admissibility.'"[71] "[A] missing link does not prevent the admission of real evidence, so long as there is sufficient proof that the evidence is what it purports to be and has not been altered in any material aspect." The government need not eliminate the possibility of misidentification or alteration entirely, "but as a matter of reasonable probability."

The Court found that because McKinney mishandled money and was under investigation, he "necessarily tampered with the gun and drug evidence." The Court stated that it had "never held that evidence of the mishandling of one piece of evidence requires that separate pieces of evidence in the same case be necessarily excluded." In the case of the cash, the "actual physical evidence … was not the only means by which the prosecution could show that money was found on the scene" - the agent's testimony to that effect was sufficient. There was no evidence suggesting that the gun and the drug evidence was misidentified - the gun was identified by its serial number and the drug evidence "was sealed and contained the Madisonville evidence label"

The Court did not err in admitting the evidence, although Logan's conviction was partially overturned for other reasons.

TRIAL PROCEDURE / EVIDENCE - CRAWFORD

Miller v. Stovall (Warden)
608 F.3d 913 (6th Cir. 2010)

FACTS: Miller was married to Bruce (Miller) for several months when she began an affair with Cassaday. She "told him tall tales" about her husband, even claiming that she'd become pregnant twice by Cassady and that Miller had "forced miscarriages." On November 7, 1999, Bruce was murdered. Within a month, "Miller had stopped seeing Cassaday, rebuffed his proposals of marriage, and started dating someone else." Cassady became more and more depressed and in February, 2000, he committed suicide. Following his death, his brother found a briefcase, which he'd previously been told existed. Inside the briefcase was evidence that Cassady and Miller had planned and executed the murder. It also included a "suicide note" to his parents, explaining what had happened. Investigation recovered substantiating

[70] U.S. v. Robinson, 104 F.3d 361 (6th Cir. 1996) (citing U.S. v. Aviles, 623 F.2d 1192 (7th Cir. 1980)).
[71] U.S. v. Allen, 106 F.3d 695 (6th Cir. 1997).

emails from Cassaday's computer, but did not find an electronic copy of IMs – instant messages - the hard copy of which was in the briefcase.

Miller was charged, but she pointed to an alternative suspect, Bruce's business partner. She was convicted of second-degree murder and conspiracy to commit first-degree murder. Michigan affirmed the conviction. Miller filed for habeas, and the District Court "conditionally granted the write. Michigan appealed.

ISSUE: Is a suicide note left for police to find, that implicates another subject, testimonial?

HOLDING: Yes

DISCUSSION: The crux of the appeal in this case was the admission of the suicide note, and whether it was prohibited testimonial hearsay. The Court reviewed the Confrontation Clause of the Sixth Amendment, noting that

> For over twenty years, courts analyzed confrontation challenges using Ohio v. Roberts, under which hearsay statements were admissible so long as they bore sufficient "indicia of reliability," that is, if they fell into a "firmly rooted hearsay exception" or bore "particularized guarantees of trustworthiness."[72] In Crawford v. Washington, the Supreme Court revised its understanding of the confrontation right.[73] The Court held that if a hearsay statement is testimonial, it can be admitted against a criminal defendant only if the declarant is unavailable for trial and the defendant had a prior opportunity to cross examine the declarant. Although the Court left unanswered whether *Roberts* still governed nontestimonial hearsay, it later held that the Confrontation Clause did not apply at all to such statements, abrogating Roberts in full.[74]
>
> At the time Crawford was decided, Miller was awaiting leave to appeal from the Michigan Supreme Court. That was subsequently denied. Although in Whorton v. Bockting,[75] the Court had held that Crawford was not retroactive on collateral review; however, Crawford governs here because a new rule applies to cases that are still on direct review when it is announced.
>
> In this case, "Michigan resolved Miller's Confrontation Clause claim on the merits, but it did so under Roberts, then good law, rather than Crawford, which replaced Roberts as the governing standard while Miller's direct appeal was still pending before the Michigan Supreme Court. We must determine, then, whether to review Miller's claim under the law prevailing at the time of the state appellate decision or the law prevailing at the time Miller's conviction became final."

The Court noted that case law on the specific issue was mixed. When, as in this case, "the law changes after a state court rules on a petitioner's claim but before her conviction becomes final, it may be critical."

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[72] 448 U.S. 56 (1980).
[73] 541 U.S. 36 (2004).
[74] See Davis v. Washington, 547 U.S. 813 (2006).
[75] 549 U.S. 406 (2007).

The Court concluded that "when the governing law changes between a state court's ruling and the date on which a petitioner's conviction became final, a federal habeas court reviewing the state-court judgment must apply the law that controlled "at the time his state-court conviction became final."[76] The Court engaged in a lengthy procedural discussion, attempting to reconcile a number of federal cases that revolved around the issue. The court also looked at the mandates under Teague v. Lane.[77]

The Court concluded that "Miller's claim is governed by Crawford, not Roberts." The Court agreed that there was "no dispute that Cassaday was unavailable at trial or that Miller never had the opportunity to cross-examine him." The only issue to be determined was whether the suicide note was testimonial. The court reviewed the available case law on the issue. The magistrate judge's reasoning that it was testimonial was based upon the fact that it was a confession and made under circumstances where an objective witness would expect to see it used at a trial. The note in question was "written by a former police officer (Cassaday), typed, signed, and placed in a sealed envelope made it formalized enough" to be considered. The Court noted that "the question of how formal a confession must be to be testimonial turns on what level of formality would lead a reasonable person to expect the confession to be used in investigation or prosecution." The content and context of the note made it clear that he intended his brother to find it and deliver it to the authorities. The contents of the briefcase were clearly his attempt to make the case against Miller. The Court, however, that there were multiple scenarios that were possible, but it was clear that "any reasonable person, particularly one with Cassaday's training, … would anticipate the prosecutorial importance of" the letter in question, as it made direct accusations against his co-conspirator.

The Court concluded it was testimonial and affirmed the conditional grant of the writ of habeas corpus.

TRIAL PROCEDURE / EVIDENCE - EXPERT / LAY TESTIMONY

U.S. v. Maze
2010 WL 2588038 (6th Cir. 2010)

FACTS: Officers Gootjes and Wojczynski (Grand Rapids, Michigan, PD) were patrolling in their area. They went by the Wealthy Street Market, which had a "no-trespass letter" on filed that indicated that "the owner of the store had authorized the police to detain, question, and arrest people who were loitering on the store's property." They spotted Maze standing near an occupied vehicle parked at the lot. When Maze saw the marked car, he "began walking away from" the car. The officers approached him and asked if he'd done business at the store, Maze stated he had not. When Officer Gootjes stepped out of the car, "Maze took off running, ignoring the officer's command to stop." He "held the waistband of his pants with his right hand" as he ran. "Officer Gootjes was concerned by this action because he thought that Maze might have a gun." He was unable to keep Maze in sight "at every moment of the chase" - two blocks - but he "remained about 15 to 20 feet behind Maze at all times." The officer saw a "clear plastic bag fall to the ground at Maze's feet" and made a "mental note of where the bag landed" although he did not stop. The other officer remained at the car to radio dispatch and call for assistance, and then drove after Maze to try to intercept him. He was able to catch up with Maze and force him down. The two officers struggled to handcuff Maze. Officer Wojcznski retraced the chase, "backtracking the route that Maze had run." He found the bag, and confirmed that was where Goontjes has seen it fall. The bag contained five individually-

[76] Williams v. Taylor, 529 U.S. 362 (2000).
[77] 489 U.S. 288 (1989).

wrapped crack pieces. They did not find a gun on Maze, but did find a cell phone and a "wad of cash," $460.

Maze was placed in another officer's car and transported. During part of the time he was in the car, the in-car video was turned off, about six minutes, but it was recording when Goontjes gave Maze his Miranda warnings.

Maze was charged under federal law with trafficking. Prior to trial, there was a dispute about what portions of the recording should be admitted. Specifically, neither the prosecutor or defense counsel wanted the first part of the recording admitted. That "part reveals that Maze refused to make a statement to the officers about his actions that day once he was given a Miranda warning." It also shows that Maze was uncooperative and hostile to the officers, kicking at the car's side window and telling Officer Huffman, "Shut up, bitch." In addition, during this exchange, "Maze demonstrated his familiarity with Officer Wojczynski by calling him Chip, the officer's nickname in the neighborhood." Maze, however, wanted that to be admitted. The Court agreed it was problematical, but did allow the officers to be questioned about the gap in the recording.

> In the portions of the recording introduced at trial, Maze told Officer Huffman that "I got somethin' for you," and asked the officer to come back to the neighborhood at night by himself. Officer Huffman perceived this to be a threat. Maze also indicated that "they didn't find what I was runnin' for" and that "there's somethin' better out there that I ran for." He reiterated that they had not yet found what he dropped, "[b]ut if they find it, hey that's what I, that's what I'll get charged with. That's what I'm pleading guilty to."

The officers testified as to his actions that day and that they knew Maze from previous contacts.

There was also discussion concerning the admission of the dispatch tape, which was of poor quality. Maze argued that it was fake. The prosecution verified it was authentic, but noted that it was unlikely the jury would be able to "get anything out of it." Officer Wojczynski verified it was his transmission. The Court excluded it, however, because the little that was audible was cumulative, most was unintelligible, but noted there was no indication it wasn't the real tape.

The Court also allowed an officer to testify as an expert as the to the "typical habits of a drug dealer as distinguished from those of a drug user."

Maze was convicted and appealed.

ISSUE: May an officer testify as an expert?

HOLDING: Yes

DISCUSSION: First, Maze objected to the exclusion of certain evidence. The Court admitted to being "frankly puzzled as to why Maze believes that [the] excluded evidence would have aided his defense." The officers could have been questioned about their relationships. The Court agreed the "danger was high that the jury would draw an unfairly prejudicial inference about Maze's guilt based on his generally unpleasant nature and his invocation of the right to remain silent." The Court disagreed that some of the recordings

would have proved the officers lied, in fact finding that the recording supported certain points made by the officers. Finally, the Court did not abuse its discretion in excluding the largely inaudible recording.

With respect to the expert testimony by the officer, Maze argued that she went outside the province of an expert and testified as to facts that were the province of only the jury to decide. However, the court did not find that her "testimony so obviously exceeded the bounds of permissible expert testimony that its admission" was error.

Maze's conviction was affirmed.

U.S. v. Smith & Garrett
601 F.3d 530 (6th Cir. 2010)

FACTS: During testimony in Smith's and Garrett's trial for involvement in a "large drug conspiracy," officers testified as to both the facts and their expert opinions about certain evidence. Both men were convicted and appealed.

ISSUE: May an officer testify both as a lay witness and an expert?

HOLDING: Yes

DISCUSSION: The Court discussed the difference between fact and opinion/expert testimony. The Court noted that "it is an error to permit a witness to testify both as a fact witness and as an expert witness unless there is a "cautionary jury instruction regarding the [witness's] dual witness roles" or "a clear demarcation between [the witness's] fact testimony and expert opinion testimony."[78] The investigator testified, for example, as to the property ownership, a fact, and also about "typical money laundering practices," arguably expert testimony. The Court agreed that the jury should have been instructed as to the investigator's dual role and how to properly weigh fact and opinion testimony from the same witness. However, the Court also noted that the defense did not object to the offered instructions, either.

The Court concluded that although it was error, the error was not no prejudicial as to require reversal.

The Court also addressed the constitutionality of the original traffic stop in the case. The vehicle was pulled over for traveling 74 mph in a 70 mph zone. The Court agreed that it was appropriate for the officer to question the driver, inquire about ID and check for warrants from the occupants. Further, "each extension of the stop was supported by reasonable suspicion of additional criminal activity," thus justifying the prolongation of the stop.

The convictions for both were affirmed.

[78] U.S. v. Lopez-Medina, 461 F.3d 724 (6th Cir. 2006).

42 U.S.C. §1983 - USE OF FORCE - TASER

Kijowski v. City of Niles / Aurilio
2010 WL 1378601 (6th Cir. 2010)

FACTS: On October 28, 2006, a wedding reception was going on at the Aulizio's Banquet Center in Warren, Ohio. Kijowski was a guest. "What should have been a wholly joyous occasion soured after Reuben Shaw, an off-duty police officer hired by the Banquet Center to provide security, observed the groom urinating in the parking lot." The matter became confused, but a scuffle ensued among several parties and "wisely, Officer Shaw radioed for backup."

In response, "the entire shift of the Warren Police Department, as well as members of other nearby departments, arrived at the Banquet Center," including Officer Aurilio (Niles PD). He arrived as police were attempting to arrest a number of "actively resisting" subjects. Officer Aurilio assisted by using his Taser in drive stun mode against a subject he later learned was Kijowski.

Kijowski gave a different version of the facts. He claimed he called dispatch to report that officers were beating people in the parking lot and that dispatch then directed police to him, on the telephone. (A dispatch recording corroborated his statement.) He claimed he was dragged from the truck and tased. He was arrested for assault, but never indicted. The record indicates that he was not found guilty of any crimes.

Kijowski filed suit against Aurilio and other defendants, which was eventually removed to federal court under 42 U.S.C. Sec. 1983. The court granted qualified immunity and Kijowski appealed.

ISSUE: Is the use of a TASER appropriate when an officer is not faced with active resistance to an arrest?

HOLDING: No

DISCUSSION: The Court noted that it "must first examine a critical factual issue – whether Kijowski was resisting arrest – as [it could not] undertake the reasonableness analysis without assessing the circumstances confronting Officer Aurilio." It "slosh[ed] … though the factbound morass of reasonableness"[79]

The Court noted that under Kijowski's account, he did not resist arrest. The language of his complaint gave a reasonable inference "that no resistance was offered prior to Officer Aurilio's initial use of his Taser. There was simply no time." The second Taser shock followed on the heels of the first, the facts indicated that the "only tenable conclusion is that it would have been impossible for Kijowski to muster any fight."

If that was, in fact the case, the Court could not say that Officer Aurilio's "conduct was objectively reasonable as a matter of law." The Court looked to other circuits, and noted that the Tenth Circuit had ruled the use of a Taser to be appropriate when officers are faced with active resistance.[80] However, "without active resistance, the equation is different." Absent a compelling justification, the use of a Taser is

[79] Davenport v. Causey, 521 F.3d 544 (6th Cir. 2008).
[80] Casey v. City of Federal Heights, 509 F.3d 1278 (9th Cir. 2007).

unreasonable. The Court did note that the Sixth Circuit precedent "potentially requires [the Court] to evaluate the Taser shocks independently." However, since the analysis in this case applied to both shocks, it considered the two collectively.

The Court further "found little difficult in concluding that the right Officer Aurilio allegedly violated was clearly established." "Against the backdrop of existing law, Officer Aurilio could not reasonably have believed that use of a Taser on a non-resistant subject was lawful."

The Court reversed the grant of summary judgment and remanded the case for further proceedings.

42 U.S.C. 1983 - USE OF FORCE

Steele v. City of Cleveland
2010 WL 1687729 (6th Cir. 2010)

FACTS: On May 8, 2007, Steele was "driving on a Cleveland thoroughfare in a vehicle with expired license plates, playing music loudly." Six officers (three named, three unnamed) made a traffic stop. Steele showed a valid OL. As he was ordered out, however, he broke away and was shot 16 times. He died.

His estate filed suit against Cleveland and a number of officers, under 42 U.S.C. §1983. The defendant officers requested summary judgment, but beyond agreeing Steele was stopped for expired plates, the "officers' story diverges from the complaint's version of events."

> The officers claim that, as VanVerth and Staimpel approached the car, Steele "started sliding his hand down his right side," disobeying their repeated orders to "keep his hands in plain At that point, Miles, who had been alerted to the impending traffic stop via police radio, arrived on the scene. He shouted to the other officers that, according to police records, Steele "had previous weapons charges." VanVerth then drew his service weapon and ordered Steele "numerous times" to exit the vehicle. Steele initially refused to comply, but "finally stood up in the doorway of the driver's side of the vehicle." The three officers ordered Steele to get down on the ground "50 or 60 times," but Steele did not comply. Steele then "dove back into the vehicle," apparently "reaching for something." At that point, VanVerth saw Steele "grab [a] gun." Staimpel "dove into the vehicle after [Steele]" and wrestled with Steele for control of the gun, during which time the gun was at least briefly pointed "directly at" VanVerth. According to Staimpel, "Steele had more control of the gun" during this time than Staimpel did. "[I]n fear of imminent danger" and "believing Steele intended to fire his weapon," each of the three officers fired at Steele, who then fell out of the car and into the street. After Steele was incapacitated, Miles radioed for an ambulance. view." VanVerth, "concerned about [Steele's] movements," ordered him out of the car. Steele refused. VanVerth attempted to "escort [him] from the vehicle," at which point Steele "broke away from [VanVerth's] grasp" and again attempted to "move his hand down his right side."

Following a number of motions, and the unresponsiveness of the plaintiff to an order that permitted further discovery, the Court granted summary judgment to the defendants. The estate plaintiff appealed.

ISSUE: Must facts be placed on the record to be considered in a summary judgment motion?

HOLDING: Yes

DISCUSSION: The estate representative argued that a "genuine issue of material fact preclude[d] summary judgment because unnamed eyewitnesses claim that Steele was unarmed and forensic evidence outside the record (the coroner's report) show[ed] that Steele was shot primarily in the back." However, these assertions were not supported by evidence placed in the record, although, of course, it could have been. The court noted that deadly force is objectively reasonable when an officer fears for their own life, or that of another.[81]

The facts put forth by the officers was compelling and unrefuted by the plaintiff. In a footnote, the Court noted that it did not reach any decision about "whether an officer "lawfully entitled to shoot to kill may nonetheless violate the Fourth Amendment by pulling the trigger too many times," since the plaintiff's assertion of 16 rounds was not actually in the record.

The summary judgment was affirmed.

Griffin v. Hardrick
604 F.3d 949 (6th Cir. 2010)

FACTS: On August 20, 2005, Griffin was arrested for disorderly conduct and resisting arrest. She was taken to the jail and during booking, asked to see a nurse. She wanted to be taken to the local hospital to have bruises on her back and arms treated. The nurse refused and "Griffin refused to take 'no' for an answer and began raising her voice with the nurse." Hardrick, a Corrections officer, responded. Hardrick "took hold of one of Griffin's arms, but Griffin attempted to pull away." She cautioned the officer that her arms were sore. Another officer, Rutledge, also responded and took her other arm; they led her down the hall. Griffin alleged she was not resisting in any way, but that "Hardrick nevertheless suddenly tripped her, causing her to fall to the floor." In turn, Rutledge fell on top of her, breaking her leg. (Hardrick contended that she was trying to get away from him and he did a "leg-sweep maneuver" to take her to the ground.) Griffin was taken to the hospital and had surgery to repair the break.

Much of the situation described was caught on videotape. Griffin filed suit against Hardrick in state court - the case was subsequently removed to federal court under 42 U.S.C. §1983. Hardrick requested, and was granted, summary judgment. Griffin appealed.

ISSUE: Is a use of force that results in an unintended injury always excessive?

HOLDING: No

[81] Tennessee v. Garner, 471 U.S. 1 (1985); Williams v. City of Grosse Pointe Park, 496 F.3d. 482 (6th Cir. 2007); Graham v. Connor, 490 U.S. 386 (1989)

DISCUSSION: Although Griffin initially argued that the force was used under the Fourth Amendment, the District Court analyzed the claim under the Fourteenth Amendment.

The Court began by noting that "prisoners are protected from the use of excessive force by the Eighth Amendment."[82] Griffin, however, as a pretrial detainee, was protected by the Fourteenth Amendment, instead. The Court noted that "the law is unsettled as to whether the analysis for a Fourteenth Amendment excessive-force claim and an Eighth Amendment excessive-force claim is the same."

Since Hardrick did not contest that he did the act that caused Griffin's injury, the Court was left to determine whether the maneuver was "applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm." Griffin argued it was inappropriate for the Court to use the videotape at the summary judgment stage. The court however, looked to Scott v. Harris and determined it was appropriate to do so.[83]

Turning to the substance of the decision, the Court noted that the "issue is … not whether the use of force was absolutely necessary in hindsight," but whether it "plausibly could have been thought necessary." The Court noted that initially, Hardrick was "calm and nonaggressive" and that he spoke to her for about 30 seconds "before ever touching her." The Court found that the "fact that Griffin had been engaged in a loud, lengthy, and animated conversation with the nurse" have Hardrick valid reason to believe that "force would be necessary." She continued to struggle as they walked away, further reinforcing that belief.

The Court found no reason to believe that Hardrick intended to use such force as would break her leg. The Court agreed that no reasonable jury could find that Hardrick ' evinced such wantonness … as is tantamount to a knowing willingness' that Griffin's injury occur."

The Court upheld the decision of summary judgment for Hardrick.

Williams v. Ingham
2010 WL 1489712 (6th Cir. 2010)

FACTS: On September 1, 2005, Officers Ingham, Bodnar and Hutchinson (Akron, Ohio, PD) were on patrol. At roll call that day, they'd received a hot sheet of stolen cars. At about 12:40 a.m., Officers Ingham and Bodnar spotted a vehicle on the list and called for backup. They observed the driver commit a traffic offense, so they "attempted to initiate a felony stop." Williams, the driver, "drove off at a high rate of speed through a residential neighborhood." During the chase, at speeds at least double the speed limit for the area, Williams "ran 18 stop signs and nearly hit a police cruiser."

The chase ended and officers bailed out to apprehend the driver. Officer Hutchinson recognized Williams as someone who had a "tendency to flee from the police." Officers approached from both sides and he was instructed to place his hands out the window and to get out of the car. When he did not comply, one of the officers opened the door, seized him and took him to the ground. Ingham, specifically, had no physical contact with Williams.

[82] Whitley v. Albers, 475 U.S. 312 (1986).
[83] 550 U.S. 372 (2007).

Williams suffered a small cut on his face. Sgt. Dorn responded to fill out a supervisor's report and to talk to Williams. Williams admitted he'd been driving and to other offenses and was eventually indicted on multiple counts.

On November 27, while out on bond for the first arrest, Williams was spotted leaving a known drug house. Again a chase ensued, reaching speeds of up to 70 mph. Williams ran stop signs and lights. The chase ended - with Williams claiming he stopped voluntarily and officers claiming he struck an officer's cruiser. Again, three officers approached (Hutchinson, Van Nostran and Diydk). They handcuffed the female passenger and ordered Williams to get out. He did not do so, and in the ensuing struggle, Officer Hutchinson broke his own finger. Officer Van Nostran used an expandable baton to jab and strike Williams. He was pulled from the car and taken to the ground. They struggled, and Officer Diydk used his Taser in drive-stun mode. They were finally able to handcuff Williams. Again, a sergeant, this time Sgt. Lesser, did a scene investigation of the use of force and ruled it justified. A small amount (crumbs) of crack cocaine and a marijuana blunt were found in the car.

Williams was evaluated at the hospital and released to the officers, who took him to jail. At some point during the process, an officer witnessed him dropping a baggie of crack cocaine. Williams was charged and convicted. Williams filed suit against the officers for excessive force in the two arrests, seeking $100 million in compensation.

The officer moved for summary judgment. The trial court found the officers' actions reasonable and dismissed the case. The Court also found that some parts of his claim were barred by Heck v. Humphrey "because a conviction for resisting arrest requires a finding that the arrest was lawful, which in turn requires that the arresting officers did not use excessive force." Williams appealed.

ISSUE: Is a use of force that results in an injury always excessive?

HOLDING: No

DISCUSSION: The Court reviewed the undisputed facts. With respect to the first arrest, the Court found the "officers used minimal force to quickly bring Williams under control and to neutralize a potential safety threat to the officers." With respect to the second arrest, the Court detailed the actions of the officers, which included one officer delivering two blows with his fist to the middle of Williams' back. Again, the Court agreed that the actions taken by the officers was objectively reasonable.

Williams failed to prove that his constitutional rights were violated, so the Court agreed the trial court did not err in rendering summary judgment.

Solovy v. City of Utica
2010 WL 1687722 (6th Cir. 2010)

FACTS: Solovy, a Type-1 diabetic, relies on an insulin pump to manage his blood sugar. On June 29, 2006, at about 8 p.m., his blood sugar fell to a dangerously low level. He drove to a convenience store to get food, but before he could do so, "he succumbed to confusion caused by his low blood sugar." He had no recollection of the next events, but he apparently drove his car from that location into the intersection, where he was found by Sgt. Carroll. Sgt. Carroll and Officer Morabito found him confused and apparently intoxicated. Solovy later testified that Carroll tapped on the window and told him to unlock the

door, which he did. He says he told the officer he needed food He claims the officer handcuffed one hand and pulled him out and to the ground and then completed handcuffing him behind his back. He complained of a "bad locked shoulder" and that the cuffs were too tight, but the officer ignored him. He also claimed the officer picked him up by the handcuffs and that caused extreme pain. The handcuffs were removed at some point before the arrival of the ambulance.

The officers "provide starkly different accounts of the encounter." They maintained they never handcuffed him and that Officer Morabito had immediately recognized that Solovy had an insulin pump. Sgt. Carroll asserted that Solovy was combative before he was placed in the ambulance. The EMS report indicated Solovy had consumed alcohol, but it was unclear where that information was obtained. The paramedic did not note that Solovy was combative and that he would "absolutely" have done so if that was the case. An IV raised his blood sugar to an acceptable level and he declined further EMS care.

Solovy's mother was contacted and picked him up at the scene. Later that evening, Solovy "began to experience progressive numbness and weakness in his right hand and wrist." He went to the ER, and later had nerve tests which diagnosed his problem as "right radial neuropathy from a handcuff injury."

Solovy filed suit under 42 U.S.C. §1983 against the two officers. Upon motion, the trial court granted them summary judgment on all claims. Solovy appealed only the claims against Sgt. Carroll.

ISSUE: Is a use of gratuitous (unnecessary) force justified?

HOLDING: No

DISCUSSION: The Court looked to the facts at hand, and found the Solovy ... presented sufficient evidence to create a genuine issue of material fact as to whether Sergeant Carroll used unreasonable force." The Court agreed that the hospital report - abrasions to wrists and bruises on knees - supported his claim that he'd been handcuffed and forced to the ground. The Court noted a reasonable jury could "disbelieve the offices and believe Solovy."

The Court found nothing in the facts before it to indicate the Solovy posed an "apparent safety risk to the public or to the police." As such, any force used to remove him from the vehicle was "gratuitous and therefore unreasonable."[84] The court also found that the handcuffing may have been unreasonable, in that Solovy claimed to have twice told the officers that the handcuffs were too tight. The injury supported the claim that he may have been subjected to excessive force in the use of the handcuffs. Next, the assertion that he was lifted by the cuffs, an action "almost guaranteed to cause substantial pain, especially to a person with a shoulder injury," described a cognizable claim as well. The Court further agreed that a reasonable officer would have known such actions to constitute excessive force. The Court agreed these assertions were enough, at this stage, to defeat summary judgment in favor of Sgt. Carroll and remanded the case for further proceedings.

[84] Solomon v. Auburn Hills Police Dep't, 389 F.3d 167 (6th Cir. 2004).

Aldini v. Johnson / Bodine / Kaczmarek / Leopold
609 F.3d 858 (6th Cir. 2010)

FACTS: In the early morning hours of May 13, 2006, Aldini, celebrating his birthday, was asked to leave a Dayton bar. He kicked out the door on his way out, and the bouncers "took him to the ground." He was arrested by nearby Dayton officers. Officer Jones later testified that he was "screaming and fighting during the arrest."

He was taken to the Montgomery County Jail for booking. He was waiting in the booking area to be photographed when he "repeatedly asked for a phone call so he could ask his friends to post bond." There was no indication that he "yelled, swore, or became abusive." However, he was told to go into one of the cells lining the area, and he complied. As Officer Johnson walked away from the cell, he again "demanded to make a call." A scuffle ensued and Sgt. Bodine, Officer Kaczmarek and Leopold arrived. Aldini later testified he was "spun around, taken to the ground, and 'viciously beat[en]' and kicked." He claimed the "officers held his body – face down and elevated above the floor – with a person holding each leg and arm in a crucifix or Vitruvian man position." He claimed he was punched and kicked, and that he was twice tased. He was bleeding profusely. He was taken to another cell and restrained. At one point the officer who had arrested him was waiting to get his cuffs back and "heard Aldini yelling and screaming in the booking room and saw many corrections officers there with him."

He was removed from the restraint chair to sign papers and then returned to it. He remained in that chair for some two hours. Photos taken at the time show his facial injuries and video indicated he was "calm and submissive."

Friends arrived to post bond and Aldini was released from the chair at 6 a.m.. He was ordered to clean his face for the booking photo. Upon release he immediately went to the hospital where he was treated for facial lacerations. He had "at least six twin taser marks on his back." He also had head trauma - multiple areas of swelling and bruising, bruising on his back, and skin irritation of his wrists. He was in a great deal of pain on the "side of his head, his nose, neck, and back." He admitted he had been drinking but denied drug use – this was confirmed by blood tests. The Dayton police took photos and a statement, but "although Dayton Police have searched for them, the statement and photographs have disappeared."

Aldini filed suit against the named jail officers, under 42 U.S.C. §1983. The District Court granted qualified immunity for Officers Leopold and Kaczmarket based upon the Fourteenth Amendment. Officer Johnson and Sgt. Bodine (who wielded the taser) were denied qualified immunity. They appealed the denial while Aldini appealed the grant of summary judgment to the other two.

ISSUE: What is the appropriate standard for judging a use of force against a pretrial detainee?

HOLDING: Fourth Amendment

DISCUSSION: The Court stated the question to be "under what Amendment should Aldini's claim be analyzed?" The Court noted that "Section 1983 does not confer substantive rights but merely provides a means to vindicate rights conferred by the Constitution or laws of the United States." In this case, the "two primary sources of constitutional protection against physically abusive governmental conduct" are the 4th and the 8th Amendments. The 4th Amendment is implicated in claims that "arise in the context of an arrest

or investigatory stop of a free citizen."[85] The 8th Amendment applies to "excessive force claims brought by convicted criminals serving their sentences."[86] When neither clearly applies, "courts have applied the 14th Amendment."[87]

The time "beyond the point at which arrest ends and pretrial detention begins" has become a "legal 'twilight zone.'"[88] Under the 4th Amendment, the standard must be whether the "use of force be objectively reasonable." In Phelps, the court "acknowledged that Fourth Amendment protections do not vanish at the moment of arrest."[89] In that case, the Fourth Amendment applied when the force was applied by arresting officers, but during the booking process. It left an "open question as to how far the Fourth Amendment's protection extended beyond the transfer of custody from the arrested officers[sic] – although [the Court] had already found that such protection applies at least through the completion of the booking procedure, which is typically handled by jailers."

The Court continued:

> There is no principled basis in the text of the Constitution, the precedents of the Supreme Court, or our prior cases for placing a dividing line between protection by the Fourth and the fourteenth Amendment at the end of custody of the arresting officer, at the completion of booking, or at the initial placement of the arrestee in a jail cell." The Court did, however, finding precedent for "placing the dividing line at the probable-cause hearing for those arrested without a warrant, since Bell v. Wolfish[90] did hold, in dicta, "that individuals who have not had a probable-cause hearing are not yet pretrial detainees for constitutional purposes." That hearing "is a judicial proceeding that affects the 'legal status' of the arrestee," just like a guilty verdict or plea "affects his 'legal status' by authorizing his detention for the duration of his sentence."

The Court concluded that the trial court erred when it applied the Fourteenth Amendment to the facts. The Court also noted that "actions that do not violate the Fourteenth Amendment's shock-the-conscience standard may nevertheless violate the Fourth Amendment's reasonableness standard for excessive force." Since the Court was applying the higher standard in making its decision in three of the four officers, the decision to use the Fourteenth Amendment rather than the Fourth was not harmless.

The court affirmed the decision with respect to Officer Johnson (who had been denied summary judgment) but vacated the decisions with respect to the other officer.

[85] Graham v. Connor, 490 U.S. 386 (1989).
[86] Whitney v. Albers, 475 U.S. 312 (1986).
[87] Lanman v. Hinson, 529 F.3d 673 (6th Cir. 2008).
[88] Wilson v. Spain, 209 F.3d 713 (8th Cir. 2000).
[89] Phelps v. Coy, 286 F. 3rd 295 (6th Cir. 2002).
[90] 441 U.S. 520 (1979).

42 U.S.C. §1983 - FALSE ARREST

Miller v. Sanilac County
606 F.3d 240 (6th Cir. 2010)

FACTS: On February 19, 2006, Miller and friends attended a demolition derby. The temperature that night was at zero and there was significant wind-chill, and there was ice on the roads. Miller dropped off his friends and then went to assist a friend who had driven off the road. Around midnight, he approached a stop sign, but was unable to stop because of ice. Deputy Wagester, in the area on an unrelated call, saw Miller run the stop sign. He made a traffic stop.

He asked for Miller's required documents. Miller produced the document he was using as a license (which was permitted under state law) and was searching for the other documents when the deputy walked away. Because he believed he detected a slight odor of alcohol on Miller's breath, the deputy had him go through field sobriety tests - and later stated he failed all but one. Miller refused a PBT.

Miller was arrested for reckless driving. He gave consent for a blood alcohol. At the hospital, the "individual who drew Miller's blood observed that Miller was shaking and was cold to the touch, which Miller claims to be the result of being subjected to the cold during the arrest." He was given a number of tickets, including one for having a .02% blood alcohol.[91] However, the actual blood tests, which were returned a week later, indicated his blood alcohol was at zero. All charges were dismissed at that point. (A later test for controlled substances also came back negative..)

Miller filed suit against Deputy Wagester and Sanilac County, under 42 U.S.C. §1983, arguing excessive force, search and seizure and malicious prosecution. The trial court granted summary judgment in favor of the defendants and Miller appealed.

ISSUE: May pursuing unproven charges be consider malicious prosecution?

HOLDING: Yes

DISCUSSION: With respect to the DUI (OWI under state law) claim, "the fact that Miller's blood alcohol was found to be 0.00% casts doubt on Deputy Wagester's claims that Miller smelled of alcohol and failed the field sobriety tests." The Court noted that it was "unclear how Miller could more specifically challenge Wagester's perceptions of Miller's odor, appearance, and performance on field sobriety tests, especially because he would have no way of knowing how the test is evaluated and claims he was not told whether he had failed and why." The Court agreed that a jury could conclude that Wagester was being untruthful and that he didn't have probable cause for the arrest.

Further, because Deputy Wagester knew of the icy road conditions, "which could certainly have caused Miller to inadvertently drive through the stop sign," the Court found there was an issue of fact as to whether Wagester had probable cause to cite for this offense. The Court found absolutely no facts to support another charge, a minor in possession.

[91] This was apparently a state law issue relating to a prior DUI conviction.

With respect to the malicious prosecution allegation, the Court noted since it found there was a genuine issue as to whether probable cause existed for the 3 criminal charges (the other offenses being non-arrestable), the court agreed that there was at least some evidence that the officer was behaving maliciously in pursuing the criminal charges. The Court also agreed that same evidence supported allowing the false arrest claim to go forward. With respect to the force claim, "Miller specifically complains about his exposure to cold weather during the stop, Deputy Wagester's conduct in effecting the arrest, and the tightness of the handcuffs."

The Court agreed that "[u]nnecessary detention in extreme temperatures . . . violates the Fourth Amendment's prohibitions on unreasonable searches and seizures."[92] However, the Court found no facts to support that he'd been kept outside in the cold any longer than reasonable necessarily to achieve the aim of the stop. With respect to the handcuffing allegation, the court noted that the claim must indicate that "(1) he or she complained that the handcuffs were too tight; (2) the officer ignored those complaints; and (3) the plaintiff experienced "some physical injury" resulting from the handcuffing."[93] However, there was no indication that he complained of the cuffs until they arrived nor do the medical records support that he suffered any lasting injury to his hands. With respect to Miller's assertion that he was slammed against the vehicle during the arrest, although he claimed he was no injured by the action, the court ruled that it believed" that a jury could reasonably find that slamming an arrestee into a vehicle constitutes excessive force when the offense is non-violent, the arrestee posed no immediate safety threat, and the arrestee had not attempted to escape and was not actively resisting." The Court found this set of facts not to be one of the "hazy cases" and that "a jury could reasonably find that the officer's alleged conduct violated Miller's rights."

The Court reversed the grant of summary judgment for the allegations discussed and affirmed it for other claims not specifically discussed.

Wysong v. City of Heath
2010 WL 1923657 (6th Cir. 2010)

FACTS: On July 13, 2010, Officer Ramage (Heath, OH, PD) was at a grocery store on an unrelated matter "when he was approached by two women who complained that a man in a white truck had been kicking the window of his truck and making lewd gestures and obscene comments to them." Officer Ramage observed the man (Wysong) going back toward the grocery. The officer called for backup and approached Wysong, "who appeared to be staggering, and asked to speak to him." He asked if the truck belonged to Wysong, "and Wysong answered, 'What truck?'" After a few more comments, Wysong fled toward the road. Ramage yelled at him to stop and told him he was under arrest, while chasing after him. Ramage caught up with Wysong and "forced him to the ground by striking him in the shoulder." With Officer Coulter's assistance, Ramage tried to handcuff Wysong, but he continued to struggle and kick at the officers. With the assistance of two more officers, they were finally able to subdue him, although he continued to struggle as he was being taken to the car.

Wysong later claimed he had no memory of what had occurred until he was inside the police car. There, he began to calm and told the officers that he was diabetic. They called for EMS to meet them at the police station, which was only a short distance away. He was cooperative until they reached the station, where

[92] Burchett v. Kiefer, 310 F.3d 937 (6th Cir. 2002).
[93] Morrison v. Bd. of Tr. of Green Twp., 583 F.3d 394 (6th Cir. 2009); Lyons v. City of Xenia, 417 F.3d 565 (6th Cir. 2005)).

he again became combative. He was treated with oral glucose at the station but the paramedic recommended he go to the hospital. Ramage accompanied him to the hospital and eventually released him there on a personal recognizance bond. Ramage completed an incident report stating that Wysong had been charged with disorderly conduct, obstructing official business and resisting arrest. It also indicated that the paramedic told him that Wysong's blood sugar was low. (His blood sugar was apparently 48 when first checked, which is critically low, but the paramedic was confused about his apparently period of lucidity prior to having been treated with the glucose.) Coulter completed a consistent report. He also picked up Ramage at the hospital and heard Ramage tell Wysong that the decision on the charges being dismissed would be up to the prosecutor.

Although there was confusion as to the prosecutor's action, the prosecutor did authorize charges of disorderly conduct. Ultimately, apparently after receiving further information, he dismissed that charge as well.

Heath filed suit for unlawful arrest and excessive force under 42 U.S.C. §1983, along with related state court actions. The District Court granted summary judgment for the defendants for the false arrest and malicious prosecution claims, and Wysong appealed. (The excessive force case was resolved in 2008 in favor of the defendants.)

ISSUE: Is an arrest false when the subject's actions are due to a medical condition?

HOLDING: No

DISCUSSION: The Court began by noting that the officers were entitled to summary judgment on the false arrest claim because "there existed a probability of criminal activity when Ramage arrested Wysong…." That they learned later of his low blood sugar "does not negate the earlier finding of probable cause."[94] With respect to the malicious prosecution claim, the Court noted that it was the prosecutor's decision to continue the case and there was "no evidence in the record that the officers misled [the prosecutor] in any way." The police are not liable for the prosecutor's decision so long as the officers were truthful.[95] The Court found that the evidence did not support Wysong's assertions that the officers' information was misleading, noting, for example, that the ER report was not complete until two days after Ramage placed the charges. The Court also noted that Wysong claimed to have no memory of what occurred, therefore he could not speak to any threats the officers allegedly made.

The Court ruled in favor of the officers in both the state and federal claims.

42 U.S.C. §1983 – SPECIAL RELATIONSHIP

Estate of Smithers (by Norris) v. City of Flint
602 F.3d 758 (6th Cir. 2010)

FACTS: On October 26, 2002, Smithers was at home, in Flint, Michigan, with Sharp, Bonner, Shirley and Booker Washington. They were watching TV and playing cards. Smithers and Shirley

[94] Peet v. City of Detroit, 502 F.3d 557 (6th Cir. 2007); Reynolds v. Jamison, 488 F.3d 756 (7th Cir. 2007).
[95] Thacker v. City of Columbus, 328 F.3d 244 (6th Cir. 2004); Kinkus v. Village of Yorkville, Ohio, 289 Fed. App'x 86 (6th Cir. 2008); Skousen v. Brighton High School, 305 F.3d 420 (6th Cir. 2002).

Washington, his girlfriend, got into an argument, and Smithers asked her to leave; she refused. Smithers called the Flint PD to ask that "someone" be removed. The dispatcher pressed for more information and he said Smithers "was not going to say anything further." Officers Murphree and Walker were dispatched under the code TWM - "trouble with a man."

Bonner later testified that "the intoxicated [Shirley] Washington threatened to kill Smithers, Sharp, and Bonner, and stated that she intended go home and "retrieve her nine millimeter handgun" and that this "would be the last time that [Smithers] would ever call the police on her."

After discussion with the parties at the house, which included Washington making statements that "if you take me to jail, I'm going to come back and kill 'em," the police took her into custody. The men went back in the house but did not lock the door. "Meanwhile, Washington was taken to the Flint police station, booked, issued an appearance ticket for trespassing, and released." She returned some hours later, fatally shot Smithers and wounded Sharp and Booker Washington. She was later convicted of murder.

Smithers's estate, along with Sharp and Bonner, filed suit against Flint and the officers, under 42 U.S.C. §1983 and state law. After limited discovery, the District Court entered summary judgment and the plaintiffs appealed. (The Court remanded the state law claims back to Michigan.)

ISSUE: Is an officer required to make an arrest in a domestic assault, if the statute makes it mandatory?

HOLDING: No

DISCUSSION: The plaintiffs alleged that since "Washington made death threats in the presence of the officers and that the officers were therefore required to detain her for at least 20 hours for domestic violence, pursuant to [Michigan state law], rather than arresting her for trespassing and releasing her on an interim bond."

The Court noted that the U.S. Supreme Court "has held that a state statute written in purportedly mandatory terms providing that "a peace office shall arrest" a person whom he has probable cause to believe has violated a domestic restraining order does not give rise to a protected property interest under the Due Process Clause."[96] Further, the Court "found that police have the "discretion to determine that—despite probable cause to believe a restraining order has been violated—the circumstances of the violation or the competing duties of that officer or his agency counsel decisively against enforcement in a particular instance." The trial court had also ruled that the statute in question was permissive and discretionary, not mandatory. The court noted that although "officers do not have the discretion to release an individual pursuant to MCL § 780.582a should she be arrested for domestic violence, the Supreme Court has held that police officers have discretion to determine whether to arrest someone for domestic violence in the first place, even if the relevant statute seems to make such an arrest mandatory."

Further, the plaintiffs argued, "the officers created a danger to them when the officers chose to ticket Washington for trespassing and to release her, rather than to detain her for 20 hours on charges of domestic violence." They also argued that the officers' arrest of Washington for trespassing created an illusion of safety because plaintiffs believed that Washington would be held for 20 hours pursuant to a

[96] Town of Castle Rock, Colo. v. Gonzales, 545 U.S. 748 (2005).

domestic violence arrest." The court looked to Deshaney v. Winnebago County Dep't of Social Services[97] and Bukowski v. City of Akron[98] and agreed that the state is not required "to protect the life, liberty and property of its citizens against invasion by private actors." The Court looked to the elements of a "state created danger claim, stating:

> (1) an affirmative act by the state which either created or increased the risk that the plaintiff would be exposed to an act of violence by a third party; (2) a special danger to the plaintiff wherein the state's actions placed the plaintiff specifically at risk, as distinguished from a risk that affects the public at large; and (3) the state knew or should have known that its actions specifically endangered the plaintiff.[99]

The Court further stated that "As it is difficult to determine whether an officer's "behavior amounts to affirmative conduct or not, we have focused on 'whether [the victim] was safer before the state action than he was after it.'"[100]

The Court continued:

> However, while this action may have been ill-advised, the officers' failure to hold Washington did not constitute an affirmative act. The officers exercised their discretion in arresting Washington for trespassing, rather than for domestic violence, for which they are protected under Castle Rock. Thus, the officers' first affirmative act had the effect of protecting Washington's eventual victims, at least for a short period of time. Their second affirmative act, releasing Washington from custody, did not "create" or "increase" the danger to plaintiffs. The officers did not require or encourage plaintiffs to remain in the unlocked house or suggest that Washington would be held for 20 hours so as to imply that plaintiffs would be safe. Their actions did not constitute an approval of Washington's threats any more than the return of the children in DeShaney or Bukowski encouraged that those children should be further harmed. As in those cases, these events were tragic; however, the officers' actions could not have been interpreted by a reasonable juror to have created or increased the danger to plaintiffs.

The plaintiffs also raised an Equal Protection claim - arguing that the officers "treated their situation differently from other domestic violence situations because the aggressor in this incident was female, rather than male, and the event took place in a poor neighborhood." To make such a claim under 1985(3), "a claimant must prove both membership in a protected class and discrimination on account of it."[101]

The plaintiffs placed in the record documentation of the number of women versus men who were arrested, but it was not broken out by domestic violence cases. The Court found that evidence unconvincing.

The Court upheld the grant of summary judgment.

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[97] 489 U.S. 189 (1989).
[98] 326 F.3d 702 (6th Cir. 2003).
[99] See Kallstrom v. City of Columbus, 136 F.3d 1055 (6th Cir. 1998); Jones v. Reynolds, 438 F.3d 685 (6th Cir. 2006) (citing Cartwright v. City of Marine City, 336 F.3d 487 (6th Cir. 2003)); see Ewolski v. City of Brunswick, 287 F.3d 492 (6th Cir. 2002)
[100] Koulta v. Merciez, 477 F.3d 442, 446 (6th Cir. 2007) (quoting Cartwright, supra.
[101] Bartell v. Lohiser, 215 F.3d 550 (6th Cir. 2000).

42 U.S.C. §1983 - AGENCY LIABILITY

Mize v. Tedford and City of Flint
2010 WL 1655835 (6th Cir. 2010)

FACTS: On September 2, 2007, Officer Tedford (Flint PD) stopped Mize for swerving. She later claimed he took her to an empty sub-station and raped her. He apparently released her, as she went to the hospital. The hospital called the police and Mize was able to identify Tedford from photos. Upon questioning, "Tedford painted a somewhat more consensual picture of the encounter but did not deny that he inappropriately had sex with Maze."

Maze was placed on leave. He later resigned and pled guilty to "willful neglect of duty." Mize filed suit against Tedford and the City of Flint, alleging the rape violated her civil rights and that the "city's policies caused the rape." Tedford was served but did not respond and judgment was entered against him in default, but the Court dismissed the City from the action. Mize appealed the summary judgment in favor of the city.

ISSUE: Is an agency liable when an employee/officer commits a sexual assault on duty?

HOLDING: No (but see discussion)

DISCUSSION: Mize argued that the city's policy or custom led to her injury. The Court, however, found that the city's policies "forbade such conduct." Further, the agency did a review and found him in violation of "no fewer than fourteen departmental policies." He was promptly removed from duty, forced to resign and signed a "commitment … that he would never serve in law enforcement again." Mize argued that a lack of supervision allowed the incident to occur.

The court continued:

> This "failure to supervise" theory of municipal liability is a rare one. Most agree that it exists and some allege they have seen it, but few actual specimens have been proved. It appears to relate to two more common theories of municipal liability: An inadequate-training theory or an "acquiesce[nce]" theory.[102]

The Court, however, found that Flint's policies were facially lawful and that the city did not act with "deliberate indifference" to the risk of sexual assault by its employees. "Tedford had no history of misconduct that gave the department notice of the risks of putting him on patrol duty." He was an 18 year veteran. The Department "did not have a pattern of sexual assaults by its officers," and only a handful had occurred in "the preceding two decades." The department had a record of investigating every allegation. Simply leaving Tedford the opportunity to commit an assault did not lead to deliberate indifference that he would take advantage of it. Although Tedford did not have a stellar work record, and may have been a lazy employee, nothing in the record suggests "the danger of rape" much less that the agency ratified such "egregious conduct."

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[102] Ellis ex rel. Pendergrass v. Cleveland Mun. Sch. Dist.; 455 F.3d 690 (6th Cir. 2006); Leach v. Shelby County Sheriff, 891 F.2d 1241 (6th Cir. 1989).

The Court affirmed the summary judgment in favor of the City of Flint.

Meier v. County of Presque Isle
2010 WL 1849228 (6th Cir. 2010)

FACTS: On September 17, 206, Meier drove his car into a ditch and through a fence. Deputy Flewelling responded to the scene. A witness identified Meier (who had left the scene) as the driver. Meier was located at a nearby residence. The deputy questioned him and "detected a strong odor of alcohol and observed that Meier's eyes were glassy." Meier admitted to having several beers and other alcoholic beverages that day. He admitted he was intoxicated. He was arrested for DUI and driving on a suspended OL.

At the jail, Meier was given a breath-analysis which returned a reading of .31. He refused a second test. Although intoxicated, he responded appropriately to the booking officer's questions appropriately. The booking officer concluded he did not need any immediate medical attention but because his BAC was over .30, she contacted the on-call doctor pursuant to policy. She summarized what she had observed and the doctor instructed her to keep an eye on him.

The jail, pursuant to policy, kept a log on his activities. Meier was given another breath test a few hours later, it was down to .217. He slept most of the evening except when he was aroused to eat or engage in some other activity. At shift change, the ongoing and offgoing Corrections officers checked all the cells together, and the same thing happened at the next shift. At approximately 11 a.m., the officer noted that Meier was "starting to feel real bad, thought it was from coming down off of the alcohol." About 1:30 p.m., when other male inmates had gone outside, the officer on duty investigated and found "Meier lying face down on the floor in a pool of blood." He was breathing but unconscious, but was apparently at least semi-conscious when the Undersheriff arrived. An ambulance was summoned and he was transported. He was comatose for about six months but eventually died.

Meier's estate filed suit under 42 U.S.C. §1983, arguing that he was denied medical care. The trial court agreed that he needed medical care, but that there was insufficient evidence that the named defendant officers "recklessly disregarded an appreciated and serious medical risk." Meier's estate appealed.

ISSUE: Does a violation of a policy automatically result in liability?

HOLDING: No

DISCUSSION: The Court reviewed two departmental policies that were considered relevant to the case. The first indicated that if a subject had an BAC of over .30, the arresting officer was to take them to a medical facility for evaluation. The second outlined what the corrections officers should do during a medical screening, and that if the officer feels the subject is too intoxicated, they should be rejected. They are also to summon medical help under certain, specific circumstances and if the subject is very intoxicated, they should be observed closely.

The court noted that normally a prisoner's claims are brought under the Fourth Amendment, that since Meier was a pre-trial detainee, his claims started under the Fourteenth Amendment. Under either, however, "the test for deliberate indifference include both an objective and subjective component, which the

plaintiff bears the burden of demonstrating."[103] The objective component required that there was a "sufficiently serious medical need," and the subjective required that the defendant being sued "subjectively perceived facts from which to infer substantial risk to the prisoner, that he did in fact draw the inference, and that he then disregarded that risk."[104] More than negligence was needed. Further, "because culpability under the test is personal, the subjective component must be addressed for each officer individually."[105] The Court reviewed each of the defendant officers individually and concluded that could not be satisfied for any of the defendants. Even if the policy was, in fact, violated, there was no indication that the officer was even aware of the policy, or that the violation contributed to his death. One officer complied with the "unwritten custom of calling a doctor for a consultation." The officers who responded to the call for assistance, when Meier was found unresponsive, did not perform CPR, but , the Court noted, they "had reason not to move him" as he was lying in a pool of blood While "rolling Meier onto his back might have been the better choice, … that is not what the Constitution requires."

Further, the Court found no violation on the part of he supervisors or the county, since no violation was found on the part of the actual actors.

The decision to dismiss was affirmed.

42 U.S.C. §1983 - VIDEO

Jackim (Bruce and Nina) v. Sam's East, Inc. (Wal-Mart)
2010 WL 2101962 (6th Cir. 2010)

FACTS: On May 25, 2003, the Jackims were shopping at a Sam's Club in Brooklyn, Ohio. A dispute arose as to whether they had to pay sales tax, and it proceeded to the membership desk. There, they began to argue with the customer service representative. An off-duty Brooklyn PD officer, Meadows, working security, responded to the altercation and asked Bruce Jackim for ID. He refused to provide it and was arrested for disorderly conduct and obstructing official business. He was handcuffed and a struggle ensued. Additional officers responded, and during the altercation, Nina Jackim tried to climb into the middle of the group. She was arrested as well. (The Jackims' version of the factors differed substantially from the above.)

In preparation for their criminal trial, they requested the security video, but there were problems with what they received. They attempted to subpoena Sam's Club employees, but the process went unserved. Nina Jackim pled not contest to a reduced charge. Bruce Jackim was tried and convicted, but was able to get the conviction overturned by arguing that the trial court improperly excluded the video recording evidence. He was convicted at a second trial, however.

The Jackims filed suit under 42 U.S.C. §1983 against the officers, Brooklyn PD, the City, and other parties. During the pretrial proceedings, the video recording was apparently traded back and forth since initial attempts to duplicate it were unsuccessful. The plaintiffs made a number of "procedural missteps" that "did

[103] See Phillips v. Roane County, 534 F.3d 531 (6th Cir. 2008); Watkins v. City of Battle Creek, 273 F.3d 682 (6th Cir. 2001).
[104] Comstock v. McCrary, 273 F.3d 693 (6th Cir. 2001) (citing Farmer v. Brennan, 511 U.S. 825 (1994)).
[105] Garretson v. City of Madison Heights, 407 F.3d 789 (6th Cir. 2005).

nothing to help their case," including untimely filings and unresponsive responses. The Brooklyn defendants argued that their claims were barred under Heck v. Humphrey.[106] Everyone appealed.

ISSUE: Does a video render first-hand testimony on an event incompetent?

HOLDING: No

DISCUSSION: First, Nina Jackim argued her no-contest plea did not prevent her from pursuing a claim for an unlawful arrest based upon a lack of probable cause. The Court, however, found that since she pled no-contest, she could no longer argue that the arrest (as opposed to any force used during the arrest) was improper. The Court agreed that Walker v. Schaeffer (among other reasons) forced the dismissal of that action.[107]

The court agreed that the plaintiffs could argue that although the business was a private actor, that if a private actor worked in concert with a state actor, it could also face liability under 42 U.S.C. §1983. There are three tests to determine state involvement: "(1) the public function test, (2) the state compulsion test, and (3) the symbiotic relationship or nexus test."[108] The court found the plaintiffs' argument to be based not "on evidence or even a reasonable inference, but on pure fantasy."

The Jackims also argued that since the video was available, that the trial court should have given no weight to Meadows' affidavit as to what occurred, under the "best evidence rule." The court found the Jackims to have totally misunderstood that rule, FRE 1002, which meant only that in order to "prove the content of a writing, recording or photograph," the original must be produced. It was appropriate to allowed Meadows to testify from his "own senses and memory," and, the Court noted, that fact that a recording was available "does not render first-hand testimony of the event incompetent."

The dismissals in favor of the defendants was affirmed.

42 U.S.C. §1983 - HANDCUFFING

Binay v. Bettendorf/Pongracz
601 F.3d 640 (6th Cir. 2010)

FACTS: Marion and Joselito Binay, along with their minor son, Sean, were living in an apartment in Southgate, Michigan. Officer Pongracz, a member of DRANO (a drug task force) received an anonymous tip that drug trafficking was occurring at the apartment. A K-9 officer went to the apartment on two occasions - the dog twice gave a positive alert on the door. (The dog did not alert elsewhere in the apartment building.)

Officer Pongracz decided he had probable cause and sought a warrant, which was granted. The warrant was executed on January 10, 2007. No evidence was found.

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[106] 512 U.S. 477 (1994).
[107] 854 F.2d 138 (6th Cir. 1998).
[108] Chapman v. Higbee Co., 319 F.3d 825 (6th Cir. 2003) (en banc) (quoting Lugar v. Edmondson Oil Co., 457 U.S. 922 (1982)). Wolotsky v. Huhn, 960 F.2d 1331 (6th Cir. 1992)).

Issues, however, arose concerning the execution.

> Mr. Binay testified that at approximately 8:20 p.m. he heard a knock at the door of Plaintiffs' apartment and was walking the seven to ten steps to answer the door when six masked men knocked down the door. Defendants brandished weapons as they entered the apartment and forced Mr. and Mrs. Binay to the floor. Defendants pointed their guns at Mr. and Mrs. Binay, instructed them not to look at the officers, and handcuffed them. Because the officers were wearing masks, Plaintiffs were unable to see the faces of the officers who handcuffed them. Defendants secured the kitchen, bathroom, and two bedrooms within moments, during which time the officers found Mr. and Mrs. Binay's son in a bedroom and forced him into the living room. Then the drug sniffing dog went through the premises and found no scent or presence of narcotics anywhere in the apartment. The dog was out of the apartment within 15 minutes.

The defendant officers then ransacked each room for the next few minutes but found nothing. The officers who conducted the search reported the results to Lt. Menna and Officer Pongracz. At that point, after completing the search, officers interrogated the Binays, who continued to be handcuffed and held at gunpoint. The Binays submitted to the officers and cooperated throughout the entire ordeal. The officers left after approximately an hour without finding narcotics.

The Binays filed suit in state court, but it was removed to federal court. Pongracz and Bettendort requested summary judgment, which was partially granted. The motions were denied with respect to the excessive force claim, with the trial court concluding they were not entitled to qualified immunity on that allegation at this point. Both officers appealed.

ISSUE: Is the use of handcuffs during a search warrant execution always permitted?

HOLDING: No

DISCUSSION: The Court reviewed the facts under the standard of Saucier v. Katz, which it found to be appropriate in this situation. The question in the case was whether the Binays "have alleged sufficient facts to show that [the officers] violated [their] Fourth Amendment rights by using excessive force in the execution of a valid search warrant at [the Binays] apartment."

The court looked to Michigan v. Summers, quoting:

> ... the Supreme Court held that "for Fourth Amendment purposes . . . a warrant to search for contraband founded on probable cause implicitly carries with it the limited authority to detain the occupants of the premises while a proper search is conducted."[109] The Court described the rationale for this limited authority as follows: In assessing the justification for the detention of an occupant of premises being searched for contraband pursuant to a valid warrant, both the law enforcement interest and the nature of the "articulable facts" supporting the detention are relevant. Most obvious is the legitimate law enforcement interest in preventing flight in the event that incriminating evidence is found. Less obvious, but sometimes of greater importance, is the interest in minimizing the risk of harm to the

[109] 452 U.S. 692 (1981).

> officers. Although no special danger to the police is suggested by the evidence in this record, the execution of a warrant to search for narcotics is the kind of transaction that may give rise to sudden violence or frantic efforts to conceal or destroy evidence. The risk of harm to both the police and the occupants is minimized if the officers routinely exercise unquestioned command of the situation.

This was clarified by Muehler v. Mena, which noted that ""[i]nherent in Summers' authorization to detain an occupant of the place to be searched is the authority to use reasonable force to effectuate the detention."[110]

The Binays alleged that the officers "completely ransacked their apartment and did not complete the search and interrogation until approximately an hour after arriving." The officers' own plan, made prior to the raid, indicated they did not anticipate firearms. The Binays "immediately submitted to and cooperated with the officers" but were held at gunpoint and handcuffed for an hour.

The court looked to Hill v. McIntyre, which was also a case in which a valid search warrant supported the search, but no evidence of illegal activity was found.[111] The Court noted that certain critical facts remained disputed, specifically, whether the interrogation continued after the search was essentially completed and after no evidence was found.

With respect to the handcuffs, the Court agreed that there are a number of cases "in which the courts have found the use of handcuffs and guns in detaining suspects not to constitute excessive force." But, the Court continued, "the fact that it is *sometimes* reasonable to use handcuffs and guns when detaining suspects does not support Defendants' argument that the amount of force used *in this case* was objectively reasonable. Whether an exercise of force is excessive will vary depending on the facts and circumstances of the specific case." The proper question-"is whether the amount of force that the officers used to secure and detain [the Binays] was objectively reasonable given the circumstances of this search." In this case, [the Binays] had no criminal record, cooperated throughout the ordeal, posed no immediate threat to the officers, and did not resist arrest or attempt to flee, all of which are factors that tend to weigh against the officers' contentions regarding the amount of force that was appropriate." In addition, "questions remain as to whether the officers' wearing of masks during the entry and search, which [the Binays] claim violates DRANO policy, added to an environment of intimidation and terror such that it contributed to a use of excessive force."

With respect to the individually named officers, the court noted that the liability for each "must be assessed individually based on his own actions."[112]

Further:

> To hold an officer liable for the use of excessive force, a plaintiff must prove that the officer "(1) actively participated in the use of excessive force, (2) supervised the officer who used excessive force, or (3) owed the victim a duty of protection against the use of excessive

[110] 544 U.S. 93 (2005).
[111] 884 F.2d 271 (6th Cir. 1989).
[112] Dorsey v. Barber, 517 F.3d 389 (6th Cir. 2008); Ghandi v. Police Dep't of the City of Detroit, 747 F.2d 338 (6th Cir. 1984).

> force."[113] As a general rule, mere presence at the scene of a search, without a showing of direct responsibility for the action, will not subject an officer to liability."[114]

With respect to Pongracz: he argued "that he did not personally participate in the alleged use of excessive force based on the handcuffing, … because he did not personally handcuff [the Binays] or have the opportunity or means to prevent the handcuffing of [the Binays.]" He also stated that " he did not have control over the decision concerning whether [the Binays] were to be held at gunpoint during the duration of the search." (He stated that a lieutenant on scene made those decisions.)

He was, however, the "leader of the raid" and had ordered Binay to the ground at the barrel of a shotgun. Binay also argued that the officer with the shotgun, and Pongracz was the only officer who carried a shotgun, pointed the weapon at them during the interrogation. As such, there is sufficient evidence that Ponzgracz did hold them at gunpoint at some point during the raid.

Bettendort argued that he was merely present at the scene and took no specific actions, the same as two other officers who had been dismissed pursuant to qualified immunity. The Court noted that Bettendorf agreed to being armed with a pistol, and to taking certain specific actions during the raid. As such, "there is a question of fact as to whether he was one of the officers pointing a gun at or securing [the Binays] during some part of the raid." The court noted that "the fact that [the officers] wore masks during the raid made it exceedingly difficult for [the Binays] to identify with precision which officers engaged in which conduct." The Court found sufficient reason to find that he was "personally involved in the conduct that violated the Fourth Amendment."

As to whether it was clearly established law, the court found that "the authority of police officers to detain the occupants of the premises during a proper search for contraband is 'limited' and that officers are only entitled to use 'reasonable force' to effectuate such a detention." The Court had "long recognized "that the Fourth Amendment permits detention using only 'the least intrusive means reasonably available.'"[115] Based on the case law in effect at the time of the warrant execution, the officers "were on notice that their detention of Plaintiffs during the search using means that were more forceful than necessary would constitute a Fourth Amendment violation."

The Court upheld the denial of summary judgment with respect to the two officers under federal law, as well as under state law.

CHILD PORNOGRAPHY

U.S. v. Humphrey
608 F.3d 955 (6th Cir. 2010)

FACTS: Humphrey was charged as a result of "befriending a minor female and surreptitiously videotaping her as she engaged in sexual acts with him." He first met the girl when she was 15, when he was paying her to clean his house. He exchanged prescription medications and cigarettes for sex. A few

[113] Turner v. Scott, 119 F.3d 425 (6th Cir. 1997).
[114] See Ghandi, supra.
[115] Burchett v. Kiefer, 310 F.3d 937 (6th Cir. 2002) (quoting U.S. v. Sanders, 719 F.2d 882 (6th Cir. 1983)).

months later, the girl told her school counselor. The case was under investigation when the girl was sent to a drug rehabilitation center, where Humphrey visited her numerous times.

The police obtained a search warrant and searched his home and vehicles. They found pills and tapes that showed the girl and Humphrey having sex. The girl stated she did not know he was videotaping their sexual encounters.

Among other charges, Humphrey was indicted for production of child pornography. The prosecution moved to have Humphrey's "knowledge of the victim's age" excluded as evidence, arguing that such knowledge (scienter) is not required for conviction under 18 U.S.C. §2251. The trial court agreed. Humphrey was convicted and appealed.

ISSUE: Is knowledge of the victim's age required for a child pornography prosecution?

HOLDING: No

DISCUSSION: Humphrey argued that he should have been permitted to "raise a mistake-of-age defense" to the charge, and that it was "constitutionally mandated under the First Amendment." The Court found the issue to be a "matter of first impression," and looked to other jurisdictions for guidance. Only one circuit had held that a mistake-of-age defense could be raised. The court found "the reasoning of the majority of our sister circuits to be persuasive and adopt[ed] it as [its] own." Nothing in the legislative history indicated that knowledge of a victim's age is required or available as an affirmative defense.

The Court upheld the lower court's decision to exclude his knowledge (or lack of knowledge) as to the victim's age.

Humphrey's conviction was affirmed.